

NORTH CAROLINA
COURT OF APPEALS
REPORTS

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¹ Retired 31 December 1974 and took oath as Emergency Judge 31 January 1975.

² Term of office expired 26 November 1974.

³ Elected 5 November 1974 and took office 6 January 1975.

⁴ Elected 5 November 1974 and took office 2 December 1974.

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W. K. McLEAN ¹⁹	Asheville

¹ Elected 5 November 1974 and took office 1 January 1975 to succeed Dewey W. Wells who resigned 31 December 1974.

² Elected 5 November 1974 and took office 1 January 1975.

³ Elected 5 November 1974 and took office 1 January 1975.

⁴ Elected 5 November 1974 and took office 1 January 1975 to succeed Donald L. Smith whose term expired 31 December 1974.

⁵ Appointed 19 February 1975 to succeed Edward B. Clark.

⁶ Elected 5 November 1974 and took office 1 January 1975.

⁷ Elected 5 November 1974 and took office 1 January 1975 to succeed James G. Exum, Jr.

⁸ Elected 5 November 1974 and took office 1 January 1975 to succeed Frank M. Armstrong who retired 31 December 1974.

⁹ Appointed 22 February 1975 to succeed W. E. Anglin who retired 31 December 1974.

¹⁰ Elected 5 November 1974 and took office 1 January 1975.

¹¹ Elected 5 November 1974 and took office 1 January 1975.

¹² Elected 5 November 1974 and took office 1 January 1975.

¹³ Elected 5 November 1974 and took office 1 January 1975 to succeed W. K. McLean who retired 31 December 1974.

¹⁴ Appointed 1 January 1975.

¹⁵ Appointed 1 January 1975.

¹⁶ Appointed 1 January 1975.

¹⁷ Appointed Emergency Judge 1 January 1975.

¹⁸ Appointed Emergency Judge 1 January 1975.

¹⁹ Appointed Emergency Judge 1 January 1975.

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	J. CHARLES McDARRIS	Waynesville

¹ Elected 5 November 1974 and took office 2 December 1974 to succeed Fentress Horner who retired 30 November 1974.

² Elected 5 November 1974 and took office 2 December 1974 to succeed Wilton F. Walker whose term expired 1 December 1974.

³ Retired 1 January 1975.

⁴ Elected 5 November 1974 and took office 2 December 1974.

⁵ Appointed 11 April 1974 to succeed N. F. Ransdell who retired 31 March 1974.

⁶ Elected 5 November 1974 and took office 2 December 1974.

⁷ Appointed 6 January 1975 to succeed Edwin S. Preston, Jr., whose term expired 31 December 1974.

⁸ Elected 5 November 1974 and took office 2 December 1974 to succeed Seavy A. Carroll whose term expired 1 December 1974.

⁹ Elected 5 November 1974 and took office 2 December 1974.

¹⁰ Appointed Superior Court Judge, 13th Judicial District, 19 February 1975.

¹¹ Elected 5 November 1974 and took office 2 December 1974.

¹² Elected 5 November 1974 and took office 2 December 1974 to succeed Thomas H. Lee whose term expired 1 December 1974.

¹³ Elected 5 November 1974 and took office 2 December 1974 to succeed Hal Hammer Walker whose term expired 1 December 1974.

¹⁴ Elected 5 November 1974 and took office 2 December 1974 to succeed Odell Sapp whose term expired 1 December 1974.

¹⁵ Elected 5 November 1974 and took office 2 December 1974 to succeed L. Roy Hughes whose term expired 1 December 1974.

¹⁶ Elected 5 November 1974 and took office 2 December 1974 to succeed C. H. Dearman whose term expired 1 December 1974.

¹⁷ Appointed Superior Court Judge, 24th Judicial District, 22 February 1975.

¹⁸ Elected 5 November 1974 and took office 2 December 1974 to succeed Wheeler Dale whose term expired 1 December 1974.

¹⁹ Elected 5 November 1974 and took office 2 December 1974 to succeed Randy Dean Duncan whose term expired 1 December 1974.

²⁰ Elected 5 November 1974 and took office 2 December 1974 to succeed Marshall E. Cline whose term expired 1 December 1974.

²¹ Elected 5 November 1974 and took office 2 December 1974 to succeed John David Ingle whose term expired 1 December 1974.

²² Elected 5 November 1974 and took office 2 December 1974.

²³ Appointed 2 December 1974 to succeed William H. Abernathy who resigned 31 October 1974.

²⁴ Elected 5 November 1974 and took office 2 December 1974.

²⁵ Appointed 10 January 1975 to succeed Kenneth A. Griffin whose term expired 31 December 1974.

²⁶ Appointed 27 January 1975 to succeed Robert W. Kirby whose term expired 31 December 1974.

ATTORNEY GENERAL OF NORTH CAROLINA

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Deputy Attorneys General

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COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

PEGGY SELLS MILLER, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE
ESTATE OF WILLIAM HERBERT MILLER v. B. V. BELK, JR.,
JAMES E. TODD AND JOEL L. KIRKLEY, JR.

No. 7426SC465

(Filed 4 September 1974)

1. Uniform Commercial Code § 11— laundry and dry cleaners — sale of goods — applicability of Code

The sale of a laundry and dry cleaning business was nothing more than a sale of the equipment, furniture, and other movables of the business and, as such, was governed by the Uniform Commercial Code.

2. Uniform Commercial Code § 22— seller's remedy of resale — notice required — measure of damages

G.S. 25-2-706 provides the remedy of resale to a seller upon a breach on the part of the buyer, and G.S. 25-2-706(1) provides that the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed by the Code but less expenses saved in consequence of the buyer's breach; however, for that measure of damages to be applicable, the resale must be commercially reasonable in all respects, and the seller must give the buyer reasonable notification of his intention to resell if the resale is at a private sale. G.S. 25-2-706(3).

3. Uniform Commercial Code § 22— resale after breach by buyer — failure of seller to give notice — measure of damages

Where plaintiff seller failed to give defendant buyer notice of her intention to resell subsequent to defendant's breach of contract, plaintiff was entitled only to the difference between the market price at the time and place for tender and the unpaid contract price as provided

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in G.S. 25-2-708(1), and the measure of damages applied by the trial judge (the difference between the contract price and the resale price) was incorrect.

APPEAL by defendant Kirkley from *Ervin, Judge*, 10 September 1973 and 15 October 1973 Sessions of Superior Court held in MECKLENBURG County. Heard in the Court of Appeals on 13 June 1974.

This is a civil action wherein the plaintiff, Peggy Sells Miller, both individually and as administratrix of the estate of William Herbert Miller, seeks to recover damages from defendants, B. V. Belk, Jr., James E. Todd, and Joel L. Kirkley, Jr., for their breach of an alleged contract to purchase plaintiff's laundry and dry cleaning business. On 31 May 1972 the plaintiff voluntarily dismissed this action as to defendants Belk and Todd, leaving Kirkley as the only remaining defendant. Thus, our usage hereinafter of the term "defendant" is intended to refer only to Joel L. Kirkley, Jr.

Plaintiff and her husband were engaged in the operation of a business in Charlotte, N. C., known as the "Norge Village Cleaners"; however, in April of 1971, plaintiff's husband died and she was left to manage the business by herself. On 13 April 1971, plaintiff duly qualified as administratrix of her deceased husband's estate. Soon thereafter plaintiff decided to sell the business and consistent with this decision placed an advertisement in a local newspaper. Several offers to purchase the business were made to plaintiff's attorney; and on 28 June 1971, defendant telephoned an offer of \$20,100.00. This offer was accepted and on 29 June 1971, this offer was submitted in writing to plaintiff's attorney, the terms of the offer stating that defendant promised to pay \$20,100.00 to plaintiff's attorney by 12:00 p.m. on 30 June 1971. After several visits to defendant's office on 30 June 1971, defendant finally executed a check on his trust account in the amount of \$20,100.00 and gave this check to plaintiff's attorney. This check was subsequently returned unpaid as a result of insufficient funds and defendant refused to deposit sufficient funds so that the check might be honored. Plaintiff thereafter served notice on defendant informing him that he was deemed in default of the contract and that "the seller will look to the remedies available at law." The business was advertised for sale again, and on 30 August 1971 plaintiff accepted an offer to purchase the business for \$10,744.56.

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Plaintiff instituted the present action on 2 December 1971 seeking to recover the difference between the contract price agreed upon by plaintiff and defendant and the sum finally realized as a result of the sale of the business on 30 August 1971. The defendant filed no answer or other pleading; and on 10 January 1972, the plaintiff moved for entry of default and entry of default judgment against the defendant Kirkley. On that same date the Clerk of Superior Court of Mecklenburg County entered default against defendant. Subsequently, defendant moved to vacate the entry of default; and on 30 May 1972, this motion was denied.

On 4 August 1972, without notice to defendant and in his absence, a default judgment was entered against the defendant. The defendant appealed from this judgment and in an opinion reported in 18 N.C. App. 70, 196 S.E. 2d 44 (1973), cert. denied 283 N.C. 665, 197 S.E. 2d 874 (1973), this Court, although holding the entry of default proper, vacated the default judgment and remanded the case to the Superior Court for further proceedings.

On remand, a hearing was held at which time both plaintiff and defendant offered evidence as to the issue of damages. The Court made findings of fact and conclusions of law and by an order dated 5 December 1973 decreed "[t]hat the Plaintiff have and recover of Defendant \$9,355.44 as compensation for the loss in selling price resulting from the Defendant's default [and] [t]hat the Plaintiff have and recover of the Defendant \$35.00 as a result of the wrongful charging of a classified telephone advertisement to her."

The defendant appealed from this judgment.

John B. Whitley for defendant appellant Kirkley.

No counsel contra.

HEDRICK, Judge.

The gravamen of this appeal is whether the trial court applied the proper measure of damages in determining that defendant is liable to plaintiff in the amount of \$9,355.44. The trial judge arrived at this sum by computing the difference between the contract price and the resale price. Defendant contends that the amount of damages awarded was incorrect for the following reasons: (1) the Uniform Commercial Code

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(Code) controls and consequently a different measure of damages applies; (2) even if the Code does not apply, the general rule is that notice of resale must be given by the seller to the breaching party in order for the resale price to be considered.

[1] G.S. 25-2-102 of the Uniform Commercial Code defines the scope of Article 2 of the Code as follows: "Unless the context otherwise requires, this article applies to *transactions in goods*" (our emphasis) G.S. 25-2-105 defines "goods" to mean "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action" Thus, we must determine whether the sale of plaintiff's laundry and dry cleaning business involves a transaction in goods and comes within the scope of Article 2. Our research discloses that this is a case of first impression in this jurisdiction and that the issue of whether the sale of a business is a transaction in goods and thus subject to Article 2 of the Code is a question which has been discussed in only a handful of cases.

In Anderson, *Uniform Commercial Code*, § 2-105:5, pp. 226-27, it is stated that the sale of a business has been held to be a sale of goods within Article 2 of the Code. This authority also notes that "[w]here the assets of a going concern are sold, Article 2 applies to the transfer with respect to the goods portion although not applicable to the non-goods portion of the transaction"

One of the first cases to face the issue now before us was *Foster v. Colorado Radio Corporation*, 381 F. 2d 222 (10th Cir. 1967). In *Foster*, supra, the parties entered into a contract to sell a radio station and the buyer breached the contract. The 10th Circuit Court of Appeals held that the Uniform Commercial Code, although not relevant to the sale of non-goods such as goodwill, the radio station's license, and real property, was applicable to the sale of movable assets, e.g., office equipment and furnishings. In the course of its opinion the Court stated, "It is quite conceivable, however, that a business could be sold in which all the assets aside from goodwill would be goods. Non-application of the Code to the sale of goods in such a case and in our case is, we think, plainly contrary to the intention of the drafters." *Foster*, supra, at 226. For another case in which the Code has been held to apply to the sale of a business, see *Melms v. Mitchell*, 266 Or. 208, 512 P. 2d 1336 (1973).

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It is our view that the sale of the business in the instant case is in reality nothing more than a sale of the equipment, furniture, and other movables of the business and as such is governed by the Code. At no point is there any mention that the sale of the laundry/dry cleaning business involves non-goods such as goodwill, real property, etc.; therefore, we hold the entire sale to be subject to the Code.

[2] G.S. 25-2-706 delineates one of the remedies available to a seller upon a breach on the part of the buyer. This remedy is resale of the goods which are the subject matter of the breached contract. "Where th[is] resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this article (§ 25-2-710), but less expenses saved in consequence of the buyer's breach." G.S. 25-2-706(1). The measure of damages set forth in G.S. 25-2-706(1) is applicable provided the requisites which are enumerated in the remainder of this section of the Code are complied with. These requisites include: (1) that the resale must be commercially reasonable in all respects and (2) where the resale is at a private sale, as is the circumstance in the present case, "the seller must give the buyer reasonable notification of his intention to resell." G.S. 25-2-706(3). In the case at bar, Judge Ervin made the following relevant finding of fact:

"26a. THAT after Kirkley's breach on July 2, 1972, the Plaintiff decided to resell the business. She was of the belief that she had a cause of action against Kirkley and the other Defendants for breach of contract and she was considering the institution of such an action. Notwithstanding this, the Plaintiff at no time gave Kirkley or the other Defendants any notice of her intention to resell or of the time, place and manner of resale or of any intention on her part to sue the Defendants for the difference between the contract price of \$20,100.00 and the amount ultimately realized on resale."

[3] This finding, when viewed in light of the notice requirement of G.S. 25-2-706(3), exemplifies the fact that the seller failed to comply with the requisites set forth in G.S. 25-2-706. What is the impact of such noncompliance with the requirements

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of G.S. 25-2-706? The Official Comment to G.S. 25-2-706 states, in pertinent part:

“Failure to act properly under this section deprives the seller of the measure of damages here provided and relegates him to that provided in Section 2-708.”

G.S. 25-2-708(1) in pertinent part provides:

“[T]he measure of damages for nonacceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this article (§ 25-2-710), but less expenses saved in consequence of the buyer’s breach.”

Thus, based on the foregoing analysis, the measure of damages applied by the trial judge (the difference between the contract price and the resale price) was incorrect, and this case must be remanded for further proceedings not inconsistent with this opinion. Furthermore, inasmuch as we have decided that the Code applies to the present transaction, we see no benefit in discussing defendant’s other contention.

The judgment of the trial court is

Vacated and remanded.

Chief Judge BROCK and Judge CAMPBELL concur.

IN THE MATTER OF THE APPEAL OF CLAYTON-MARCUS COMPANY, INC., FROM ADMINISTRATIVE DECISION NO. 114 OF TAX REVIEW BOARD OF NORTH CAROLINA

No. 7410SC284

(Filed 4 September 1974)

Taxation § 31— use tax— fabric used in furniture manufacturer’s sample books

Fabric taken from a furniture manufacturer’s inventory for use in making swatch books of sample fabrics is “used or consumed” within the meaning of the use tax statute, G.S. 105-164.6, and is not an “ingredient or component part of tangible personal property which is manufactured” within the meaning of the exemption provided by G.S. 105-164.13(8).

Judge BAILEY dissenting.

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APPEAL by petitioner from *Hobgood, Judge*, 26 November 1973 Session of Superior Court held in WAKE County. Heard in the Court of Appeals on 28 May 1974.

The petitioner, Clayton-Marcus Company, Inc., (hereafter referred to as petitioner) is engaged in the business of manufacturing upholstered furniture in Hickory, North Carolina. On 15 May 1968, the N. C. Department of Revenue completed an examination of petitioner's records and determined that additional tax in the sum of \$5,491.79 was due. The audit report disclosed that the additional tax was assessed on petitioner's sales of furniture at retail, purchases of mill machinery and machinery parts, and certain purchases subject to the 3% rate of use tax which included fabric withdrawn from petitioner's ingredient materials inventory for use in the production of swatch books. Swatch books are books produced by petitioner which are used in displaying the different types and colors of fabric available on the petitioner's manufactured products.

Petitioner requested a hearing before the Commissioner of Revenue and this hearing was held on 3 September 1969. Thereafter, on 1 May 1970, the Commissioner rendered his decision abating the penalty of \$623.70, but otherwise sustaining the tax assessed. Petitioner then petitioned the Tax Review Board for review of the Commissioner's decision and on 24 May 1971, the Tax Review Board entered Administrative Decision No. 114 which affirmed the Commissioner's decision. The Tax Review Board, in focusing its decision upon the propriety of the assessment of a sales and use tax on the fabric used in the production of swatch books stated:

"We note . . . the Taxpayer also objected to the assessment by the Commissioner of Revenue with respect to certain mill machinery, mill machinery parts and accessories, but it does not appear to have brought that objection forward for review, not having specifically covered it in its petition, or having referred to it in its oral argument or brief filed with the Board."

The statement of facts contained in Administrative Decision No. 114 contains the following explanation of swatch books and also delineates the disagreement between petitioner and the Department of Revenue:

"With reference to these swatch books, the fabric which the Taxpayer had purchased was brought into its

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plant and the required yardage was cut therefrom to produce the number of swatches desired. The fabric was then cut, sewn and assembled by the Taxpayer to produce books of sample fabrics which were then delivered, either to the Taxpayer's employed sales representatives within and without the State, or to the Taxpayer's customers who are furniture dealers within and without the State who sell the Taxpayer's line of furniture. The swatch books are used to illustrate the fabrics available as coverings for furniture manufactured by CLAYTON-MARCUS.

No sales or use tax was paid by the Taxpayer on any of the aforementioned fabric. The Commissioner of Revenue, however, assessed sales and use tax upon the cost price of the fabrics which it used in swatch books which were delivered to furniture dealers and to in-State sales representatives of CLAYTON-MARCUS."

In rendering its decision the Tax Review Board considered and rejected taxpayer's arguments that the fabric used in making swatch books was exempt from the sales and use tax because (1) the fabric purchased which was used by petitioner to prepare swatch books was exempt from taxation under the provisions of G.S. 105-164.13 (8) as "an ingredient or component part of tangible personal property which is manufactured", and (2) the fabric was exempt from taxation by the "storage and use exclusion" provided in G.S. 105-164.3 (19).

On 23 July 1971, Clayton-Marcus petitioned the Superior Court for judicial review of Administrative Decision No. 114. On 28 September 1973, petitioner moved for summary judgment. Likewise, on 23 November 1973, respondent moved for summary judgment. On 4 December 1973, the court entered judgment, which in pertinent part provided:

"NOW, THEREFORE, IT IS CONSIDERED, ORDERED, ADJUDGED AND DECREED that the Motions for Summary Judgment heretofore filed by the petitioner and the respondent be, and the same are, hereby denied as being an inappropriate means of determining a proceeding under Article 33 of Chapter 143 of the General Statutes; and that the decision of the Tax Review Board be and the same is hereby affirmed in all respects and that these proceedings shall be and the same are hereby dismissed; the petitioner shall pay the costs to be taxed by the Clerk."

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The petitioner appealed from this judgment.

Kenneth D. Thomas for petitioner appellant.

Attorney General Robert Morgan by Assistant Attorney General Myron C. Banks for respondent appellee.

HEDRICK, Judge.

G.S. 105-164.6 provides in pertinent part:

“An excise tax is hereby levied and imposed on the storage, use or consumption in this State of tangible personal property purchased within and without this State for storage, use or consumption in this State. . . .”

When the material in question is withdrawn from inventory, cut, and made into swatch books, which are distributed to petitioner's customers free of charge solely for the purpose of promoting sales of the furniture manufactured by petitioner, it is “used or consumed” within the meaning of the statute, and is subject to the tax levied pursuant thereto unless exempted by G.S. 105-164.13(8) or excluded by G.S. 105-164.3(19).

“Sales of tangible personal property to a manufacturer which enters into or becomes an ingredient or component part of tangible personal property which is manufactured” are exempt from the tax imposed by G.S. 105-164.6. See, G.S. 105-164.13(8). The petitioner is engaged in the business of manufacturing furniture, not swatch books. Therefore, since the material (fabric) is used and consumed without being converted into tangible personal property (furniture in this case), which may be subject to a sales tax, it is not exempt from the tax.

G.S. 105-164.3(19) provides:

“‘Storage’ and ‘Use’; Exclusion—‘Storage’ and ‘use’ do not include the keeping, retaining, or exercising any right or power over tangible personal property for the original purpose of subsequently transporting it outside the State for use thereafter solely outside the State and which purpose is consummated, or for the purpose of being processed, fabricated, or manufactured into, attached to or incorporated into, other tangible personal property to be transported outside the State and thereafter used solely outside the State.”

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Our conclusion that the material in question is used and consumed within the meaning of G.S. 105-164.6 when it is withdrawn from inventory and made into swatch books and that swatch books are not manufactured within the meaning of G.S. 105-164.13(8), obviates the necessity of our discussion whether such material is excluded by G.S. 105-164.3(19).

The judgment of the Superior Court is

Affirmed.

Judge MORRIS concurs.

Judge BAILEY dissents.

Judge BAILEY dissenting.

Under the opinion of the majority all fabric used in swatch books is considered to be taxable. Even the tax authorities under their interpretation of G.S. 105-164.3(19) have excluded from taxation the fabric included in swatch books which are sent to out-of-state salesmen of the taxpayer and used solely out of state. There are other questions of statutory construction in this case, for example whether the swatch books as well as the furniture constitute manufactured products, whether use outside the state implies use by the taxpayer only, and whether the statute requires that the manufactured product must be sold in order to qualify its component parts for exemption from tax, which would seem to justify a definitive ruling by the Supreme Court and possible eventual legislative clarification.

KEEFER RAYMOND LING, JR. v. EDWIN GRAHAM BELL

No. 7427DC482

(Filed 4 September 1974)

1. Damages §§ 6, 15— loss of use of vehicle

The right to recover for loss of use of a vehicle is limited to situations in which damage to the vehicle can be repaired at a reasonable cost and within a reasonable time, and the measure of damages is the cost of renting a similar vehicle during a reasonable period for repairs.

2. Damages § 15— loss of use of vehicle — sufficiency of evidence

Plaintiff's evidence was sufficient to be submitted to the jury on the issue of damages for loss of use of a vehicle where it tended to

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show that the vehicle damaged was one used by plaintiff's wife to transport her to and from work, that the rented vehicle was returned while his wife was on vacation and when plaintiff purchased a new car for her transportation to and from work, and that plaintiff did check on the time necessary to complete the repairs.

3. Damages § 16— loss use of vehicle — instructions — reasonable time for repair

In an action to recover for the loss of use of a vehicle for which repairs were completed six weeks after the accident, the trial court erred in failing to charge the jury that, in order to award damages for the cost of renting a replacement vehicle, it must find that the period of time in which rental expenses were incurred was reasonable, and that if the period of time required for repairs was unreasonable, the recovery for rental expenses would be limited to that period from the date of the accident to that date by which plaintiff, with a reasonably diligent effort, could have purchased a replacement vehicle.

ON *certiorari* to review the order of *Bulwinkle, District Judge*, at the 29 October 1973 Session of GASTON County District Court. Heard in the Court of Appeals 13 June 1974.

This action arises out of a collision between automobiles of plaintiff and defendant on 12 January 1973 in Gaston County. Plaintiff was driving a car owned by him and ordinarily operated by his wife. The wife of defendant was driving in the same direction as was plaintiff when she rounded a sharp curve, crossed a patch of ice on the road and slid into the rear of plaintiff's vehicle.

Plaintiff's damaged vehicle was taken to Lewis Motor Company on the day of the accident, and it was repaired six weeks later. While the plaintiff's car was being repaired, he rented a vehicle for his wife to use in order to go to work. The rental expense for this substitute vehicle was \$402.67, and plaintiff seeks to recover this amount as special damages for loss of use of the vehicle.

The trial court instructed the jury as follows on the issue of damages for loss of use of a replacement vehicle:

"When a vehicle damaged by another can be repaired at a reasonable cost and within a reasonable time, the owner may recover for loss of its use the measure of such damages as the cost of renting a similar vehicle during a reasonable period for repairs.

* * *

The defendant contends that the period of time during which the plaintiff rented this rental automobile was ex-

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cessive and unreasonable because repairs of a vehicle should not take as long as plaintiff contends they took. The plaintiff says that he immediately turned his car in for repairs and that he has no control over the length of time that the repair shop kept the vehicle before the repairs were completed and plaintiff contends that you should answer this issue in an amount of \$402.67.”

Issues were thereupon submitted and answered by the jury as follows:

“1. Was the plaintiff’s property damaged by the negligence of the defendant’s agent, as alleged in the Complaint?

ANSWER: Yes.

2. What amount, if any, is the plaintiff entitled to recover of the defendant:

(a) For property damage? ANSWER: \$1,500.00

(b) For rental of a replacement vehicle? ANSWER: \$402.67”.

We granted defendant’s petition for certiorari on 16 April 1974. Further facts necessary to our opinion will be set out hereinafter.

Mullen, Holland and Harrell, P.A., by Philip V. Harrell, for plaintiff appellee.

Craighill, Rendleman and Clarkson, P.A., by Hugh B. Campbell, Jr., for defendant appellant.

MORRIS, Judge.

[1] In *Roberts v. Freight Carriers*, 273 N.C. 600, 606, 160 S.E. 2d 712 (1968), the Supreme Court set forth the rule for damages for the loss of use of a vehicle.

“When a vehicle is negligently damaged, if it can be economically repaired, the plaintiff will also be entitled to recover such special damages as he has properly pleaded and proven for the loss of its use during the time he was necessarily deprived of it. *Trucking Co. v. Payne*, 233 N.C. 637, 65 S.E. 2d 132. See also *Binder v. Acceptance Corp.*, 222 N.C. 512, 23 S.E. 2d 894.”

This right to recover for loss of use is limited to situations in which damage to the vehicle can be repaired at a reasonable

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cost and within a reasonable time. The measure of damages is the cost of renting a similar vehicle during a reasonable period for repairs. In the event that the vehicle cannot be repaired or repairs would be delayed for an unreasonable time, plaintiff has the duty to purchase another vehicle, and he can recover the rental value of a replacement vehicle for the interval reasonably necessary for the acquisition of a new vehicle. *Roberts v. Freight Carriers, supra*.

[2] Plaintiff's evidence tended to show that the vehicle damaged was one used by plaintiff's wife to transport her to and from her work, and further that the vehicle rented was returned during the time his wife was on vacation and at the time he purchased a new car for her transportation to and from work. It appears that he did check on the time necessary to complete the repairs. We are of the opinion that plaintiff's evidence meets the minimal requirements of taking his case to the jury on the issue of damages for the loss of use.

Nevertheless, we feel that the instruction of the court was inadequate with respect to plaintiff's duty to avoid or mitigate his damages. In the above-quoted portion of its instruction, the court merely stated that defendant contended that the repair period was unreasonable, and that plaintiff contended in effect that the length of the repair period was beyond his control.

Plaintiff's own evidence was that he had the car taken on the day of the accident to Lewis Motor Company and that he did not discuss the length of time required for repairs until two or three days later. While he was aware of other repair shops in the area, plaintiff made no inquiries of other shops concerning repairs. He also failed to investigate the possibility of the loan of a car while his car was being repaired. For a few months prior to the time of the accident, plaintiff had been looking for a new car to replace the one his wife had been driving—the vehicle involved in the accident. Plaintiff rented a car on the day of the accident, because the car damaged had been the car used by his wife to drive to work. Plaintiff kept the rented car for 11 days and continued to use his own car to transport himself to work. At the end of 11 days, plaintiff returned the rented car for seven or eight days, while his wife was on vacation. At the end of this period, he once again rented a car. The second rental car was returned three weeks and one day later when plaintiff purchased a new car. When asked by counsel why he had not purchased a new car earlier, plaintiff

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responded that "the main reason was that we hadn't found one we wanted to purchase."

[3] While this evidence is sufficient to raise a question of fact whether the cost and period of time of the car rental was reasonable, since plaintiff has a duty to purchase a replacement vehicle if the time required for repair is excessive, *Roberts v. Freight Carriers, supra*, it was error for the trial court to submit the issue of replacement cost without a more complete instruction. The court should have charged that, in order to award damages for rental value during the period of deprivation, the jury must find the period of time in which rental expenses were incurred was reasonable. The court should have further charged that if the period of time required for repairs was unreasonable, the recovery for rental expense should be limited to that period from the date of the accident to that date by which plaintiff, with a reasonably diligent effort, could have purchased a replacement vehicle.

For the reasons stated, defendant is entitled to a

New trial.

Judges VAUGHN and BAILEY concur.

STATE OF NORTH CAROLINA v. MRS. MICHAEL (REBA) SPLAWN

No. 7417SC633

(Filed 18 September 1974)

1. Narcotics § 4— distribution of amphetamines — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution of defendant upon two charges of felonious distribution of amphetamine tablets where two SBI agents testified to separate sales to them by defendant of tablets which an SBI chemist testified his subsequent laboratory analysis showed to contain amphetamines.

2. Constitutional Law § 31; Criminal Law § 80— motion to release tablets for analysis

In a prosecution upon charges of felonious distribution of amphetamines, the trial court's failure to allow defendant's motion for an order directing SBI agents to release at least two of the tablets in each case so that she could have an independent analysis made of them was not error where the record shows no request to the solicitor pursuant to GS. 15-155.4 and no denial of such request by him; further-

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more, the court's failure to rule on such motion was not error where the record fails to show that the motion was ever brought to the trial court's attention with request that he rule upon it.

3. Constitutional Law § 31— right to have witness appear before jury — waiver by counsel

Defendant's right to have an SBI chemist testify against her only by appearing in person before the jury was a right which her counsel could waive in her behalf, and her counsel waived such right when he stipulated that the chemist's testimony, both on direct and cross-examination, could be taken on the day preceding the trial and read to the jury by the court reporter. Art. I, § 23 of the N. C. Constitution.

4. Indictment and Warrant § 10— reference to alias

Defendant was not prejudiced by reference in the indictments to an alias where the only time the alias was mentioned was when the solicitor read the indictments at the time of the arraignment and there was no showing that the reference to the alias in the indictments was made in bad faith.

5. Criminal Law § 52; Narcotics § 3— expert testimony — results of analysis

In a prosecution for felonious distribution of amphetamine tablets, the trial court did not err in permitting an SBI chemist to testify that his analysis of the tablets showed them to contain the substances amphetamine and methamphetamine rather than permitting the chemist to testify only in response to a question calling for his opinion as to what the tablets contained.

6. Criminal Law § 86— cross-examination of defendant — impeachment — acts of criminal conduct

In a prosecution for felonious distribution of amphetamines, the trial court properly permitted the solicitor to ask defendant on cross-examination for impeachment purposes whether she possessed and sold amphetamine tablets and other specified drugs on specified dates unrelated to the present cases, for which offenses defendant had not been tried and convicted.

7. Criminal Law § 114— recapitulation of evidence — alibi — reference to wrong day

In a prosecution for distribution of amphetamines wherein defendant presented evidence that she was at home sick in bed on the Wednesday when the offenses allegedly occurred at her store, the trial court's reference to Monday rather than to Wednesday as the day of a doctor's visit to defendant's home while recapitulating defendant's evidence did not constitute prejudicial error since it is clear that the jury understood that throughout such portion of the charge the judge was referring to the day the offenses were allegedly committed.

8. Narcotics § 2— distribution of amphetamines — indictment

Bills of indictment charging defendant with felonious distribution of amphetamines were valid, the reference to amphetamine as being a "controlled substance listed in Schedule II under the North Carolina Controlled Substances Act" being correct as of the date of the offenses charged.

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ON *Certiorari* to review defendant's trial before *Long, Judge*, 4 November 1973 Session of Superior Court held in SURRY County.

In a consolidated trial, defendant was convicted on two charges of felonious distribution of amphetamine tablets, a violation of the North Carolina Controlled Substances Act. From judgment imposed she gave notice of appeal. To permit perfection of the appeal, this Court granted her petition for writ of certiorari.

Attorney General Robert Morgan by Assistant Attorney General James E. Magner, Jr. for the State.

R. Lewis Alexander and Daniel J. Park for defendant appellant.

PARKER, Judge.

[1] Defendant's motions for nonsuit were properly overruled. There was ample evidence to require submission of both cases to the jury. Two SBI agents testified to separate sales to them by defendant of tablets which the SBI chemist testified his subsequent laboratory analysis showed to contain amphetamines. Defendant's contention that she was entitled to nonsuit because the chemist's testimony was improperly admitted and that without his testimony there was no evidence to show the contents of the tablets is without merit. In passing on a motion for nonsuit all evidence admitted at trial, including incompetent evidence which may have been admitted over a defendant's objections, is to be considered. *State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534 (1970) ; *State v. Virgil*, 263 N.C. 73, 138 S.E. 2d 777 (1964) ; *State v. McMilliam*, 243 N.C. 771, 92 S.E. 2d 202 (1956).

[2] Defendant assigns error to the court's failure to rule upon and allow her written motion, filed on 8 October 1973 and apparently intended to apply in eight other criminal cases then pending against her as well as in these two cases, in which she prayed for an order directing the SBI agents to release at least two of the pills or capsules in each case in order that she might have an independent analysis made of them. In this assignment of error we find no merit. "The common law recognized no right of discovery in criminal cases." *State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334 (1964), cert. denied, 377 U.S. 978, 12 L.Ed. 2d 747, 84 S.Ct. 1884 (1964). By statute in this State,

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G.S. 15-155.4, in criminal cases before the superior court the judge "shall for good cause shown, direct the solicitor or other counsel for the State to produce for inspection, examination, copying and testing by the accused or his counsel any specifically identified exhibits to be used in the trial of the case sufficiently in advance of the trial to permit the accused to prepare his defense." This statute expressly provides that prior to the issuance of any such order "the accused or his counsel shall have made a written request to the solicitor or other counsel for the State for such inspection, examination, copying or testing of one of more specifically identified exhibits . . . and have had such request denied by the solicitor or other counsel for the State or have had such request remain unanswered for a period of more than 15 days." Thus, the statute expressly contemplates request to the State's counsel and denial, or neglect by him equivalent to denial, prior to issuance of any such order. *State v. Macon*, 276 N.C. 466, 173 S.E. 2d 286 (1970); *State v. Mason*, 17 N.C. App. 44, 193 S.E. 2d 324 (1972). Here, the record fails to disclose any request made to or denial by the solicitor. All that the record shows is that the motion was filed in a large number of cases prior to the trial of these two cases, and nothing indicates that a copy was ever served upon the solicitor or that the motion was otherwise brought to his attention. Thus, defendant has failed to show that she complied with the statutory requirements for obtaining the relief which she sought. Furthermore, the record fails to show that defendant's motion was ever brought to the trial judge's attention with request that he rule upon it, and absent such a showing defendant's assignment of error directed to the trial judge's failure to rule will be considered without merit.

[3] Because the SBI chemist could not be present on the day of the trial, by stipulation of defendant's counsel the chemist's testimony was taken, both on direct and cross-examination, on the day preceding the trial. This testimony was then read to the jury at the trial by the court reporter. The stipulation by which defendant's counsel agreed to this procedure was made in open court and entered into the record prior to call of the cases, and at the trial no objection to this procedure was interposed on behalf of the defendant. On this appeal defendant contends that the procedure followed resulted in denial of her constitutional right under Art. I, Sec. 23 of the North Carolina Constitution to confront her accusers. In support of this contention, defendant argues that this is a right which may not be waived by

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counsel but can be waived only by the accused in person. We do not agree. It is settled that the constitutional right of an accused to confront the witnesses against him may be waived even in a capital case, *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969), and defendant has cited no case which holds that such a waiver may not be effected by an accused's counsel acting in his behalf. *State v. Ferebee*, 266 N.C. 606, 146 S.E. 2d 666 (1966), cited and relied on by defendant, dealt with the right of the accused to be present during the course of his trial and did not deal with his right to have the witnesses against him testify in person before the jury. Other cases cited by defendant dealt with the right of confrontation and did not deal with the manner in which and by whom that right may be waived. One of the principal purposes served by the right of confrontation is to preserve to the accused the right of cross-examination, yet the right to cross-examination itself may be waived by an accused's counsel by simply failing to exercise it at the trial. We hold that defendant's right to have the SBI chemist testify against her only by appearing in person before the jury was a right which her counsel could waive in her behalf and that he did so in this case. Incidentally, we note that in this case defendant's counsel did not surrender but fully exercised the right to cross-examine the SBI chemist.

[4] Defendant next assigns as error that she was named in the indictments as "Mrs. Michael Splawn (Alias—Reba Money)," contending that the reference to an alias prejudiced the jury against her. Description of the accused in a bill of indictment by whatever alias name he may have been known to use, if done in good faith, is proper. *State v. Culp*, 5 N.C. App. 625, 169 S.E. 2d 10 (1969). In the present case the defendant admitted she had formerly been married to a man named "Money," and the bills of indictment were never read nor was any reference made to the alias at any time after the trial jury was selected and impaneled. The only time the alias was mentioned was when the solicitor read the bills of indictment at the time of the arraignment. There has been no showing that the reference to the alias in the bills of indictment was made in bad faith, and this assignment of error is overruled.

[5] On competent evidence the court found the SBI chemist, who held a doctorate in organic chemistry, to be qualified to give his opinion in the field of chemical analysis. The witness then testified that he made an analysis of the tablets given him

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by the SBI agents and which they testified had been sold to them by the defendant. The solicitor then asked the witness what was the result of his analysis, and over defendant's objection the witness was permitted to answer that his analysis showed the tablets to contain the substances amphetamine and methamphetamine. Defendant assigns this as error, contending that the witness should have been permitted to testify only in response to a question calling for his opinion as to what the tablets contained. The witness, however, was testifying to an analysis which he had himself made and thus was testifying to facts which he had himself observed. It was competent for him to testify what the results of his analysis showed, and defendant suffered no prejudice when the witness was not required to give his answer only in the form of an expression of an opinion. We note that on cross-examination by defendant's counsel the witness testified in considerable detail as to the exact types of chemical tests which he made and the results which he obtained in making his analysis. We find no error in the admission of the chemist's testimony or in the admission in evidence of the written laboratory reports which he dictated and which were typed by his secretary and checked by him at the time his tests were made and which he testified correctly and accurately set forth his findings.

[6] Over objection the solicitor was permitted to ask defendant on cross-examination for impeachment purposes whether she had possessed and whether she had sold amphetamine tablets and other specified drugs on specified dates unrelated to the present cases, for which offenses she had not been tried and convicted. There was no error in the court's rulings permitting the solicitor to ask these questions. Although a witness, including the defendant in a criminal case, may not be cross-examined for purposes of impeachment as to whether he has been indicted or is under indictment for a criminal offense other than that for which he is then on trial, *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971), he may be questioned as to specific acts of criminal conduct, and such cross-examination for purposes of impeachment is not limited to questions concerning convictions of crimes. *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973). Here, the solicitor did not ask defendant whether she had been indicted or charged with other offenses but questioned her only concerning her own conduct.

Defendant assigns as error that the trial court did not allow counsel for defendant to cross-examine the State's witness Cabe

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concerning a discrepancy in his testimony. The record does not support the contention on which this assignment is based, but on the contrary shows that defendant's counsel was permitted to cross-examine the witness fully. This assignment of error is overruled.

[7] The indictments charged defendant with committing the offenses on 14 March 1973, and the two SBI agents testified that they purchased the tablets from defendant on that date, which was on a Wednesday. They testified that they arrived at the store operated by defendant where the purchases took place at approximately 11:30 a.m. and left about 1:15 p.m. Defendant testified she was sick on Wednesday, 14 March 1973, and that her store was not open at the time the agents testified they came there. Defendant's witness, Dr. Ralph M. Cook, testified that he went to see the defendant on 14 March 1973 between twelve and two o'clock, during the lunch hour and while he was on the way to the hospital, and at that time her store was closed for business and defendant was in her home sick in bed. While referring to this testimony in charging the jury, the judge said:

"The defendant's evidence further tends to show that on March 14, 1973, the date that she is alleged to have sold the drugs to Agents Prillman and Hoggard, that the defendant's store was not open for business except for a short while after school when the defendant's thirteen year old daughter opened the store.

"That the defendant on this date was sick and that some time between twelve Monday and two P.M., that Dr. Ralph Cook, a physician, came to make a house call and gave her a shot for nausea and headache pain, that the defendant was in the bed all day and the defendant's doctor returned to give her another shot after eight P.M."

Defendant now contends that reversible error occurred when the judge inadvertently referred to Monday rather than to Wednesday as the day of Dr. Cook's visit. We do not agree. Despite the judge's mistake in naming the wrong day of the week, we think it abundantly clear that the jury understood that throughout this portion of the charge the judge was referring to 14 March 1973, the day the offenses were alleged to have been committed. "Furthermore, it is the general rule that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury

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retires so as to afford the judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal." *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970). Here, defendant's counsel failed to call the judge's attention to the inaccuracy in his reference to the day of the week.

[8] Finally, we find no error in the denial of defendant's motions in arrest of judgments by which she challenged the validity of the bills of indictment. We find the bills of indictment valid. Defendant was adequately identified and the offenses charged were accurately stated. The reference to amphetamine as being a "controlled substance listed in Schedule II under the North Carolina Controlled Substances Act" was correct as of the date of the offenses charged. Nearly a year before that date and on 23 March 1972, the State Board of Health, acting under authority of G.S. 90-88, rescheduled effective 24 April 1972 amphetamine (as well as methamphetamine and certain other drugs) from Schedule III to Schedule II. See *State v. Newton*, 21 N.C. App. 384, 204 S.E. 2d 724 (1974).

We have carefully examined all of defendant's remaining assignments of error and find no prejudicial error in defendant's trial. Accordingly, in the trial and judgments rendered we find

No error.

Judges CAMPBELL and VAUGHN concur.

JERRY L. CORBIN v. CHARLES W. LANGDON

No. 7418DC448

(Filed 18 September 1974)

1. Contracts § 12— construction of contract — unambiguous terms

The court is required first to look at the contract itself to ascertain the intention of the parties, and where the language is clear and unambiguous, the court is obliged to interpret the contract as written and cannot, under the guise of construction, reject what parties inserted or insert what parties elected to omit.

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2. Contracts § 26— contract to sell accounts receivable — parol evidence properly excluded

A contract between the parties was clear and not ambiguous where, by its terms, the seller agreed to sell his dental equipment, furniture, and fixtures to the purchaser, the parties agreed with respect to fees during an interim period during which purchaser and seller practiced together, they agreed that seller's accounts receivable should be included in the sale and that all amounts received from that source from and after 1 September 1970, the date of the contract, should be the property of purchaser, seller agreed not to compete with purchaser in the City of Greensboro for a period of two years, and purchaser agreed to assume the obligations of seller under a lease agreement then existing; therefore, the trial court properly refused to allow parol evidence which changed the intent of the parties as expressed in their written agreement.

3. Contracts § 26— parol agreement to amend contract — evidence properly excluded

The trial court did not err in refusing to consider evidence of an alleged parol agreement amending the contract between plaintiff and defendant where there was not sufficient evidence of mutuality of assent to support the agreement.

APPEAL by plaintiff from *Kuykendall, Judge*, 29 October 1973 Session, District Court, GUILFORD County. Argued in Court of Appeals 26 August 1974.

On 1 September 1970, plaintiff and defendant, both dentists, entered into a contract the pertinent sections of which are:

"1. SALE OF EQUIPMENT. The Seller [plaintiff herein] hereby sells, transfers and conveys to the Purchaser [defendant herein] all the dental equipment, instruments, apparatus, furniture and fixtures, patients' records, X-ray files, books, drugs, medicines, bottles, supplies and all other items located in the Seller's office and used in his practice, all as more fully set forth on Schedule A."

2. REPRESENTATIONS. (Not pertinent to appeal.)

"3. PURCHASE PRICE. The Purchaser hereby pays to the Seller Eighteen Thousand Dollars (\$18,000.00) as consideration for the sale of equipment heretofore referred to, the receipt of which is hereby acknowledged.

"4. INTERIM PRACTICE. Prior to the date of this Agreement, the Purchaser had the right and did assist the Seller in his practice and observed his methods of operation. All fees earned by the Purchaser for services rendered by him to his own patients up to the date of this Agreement shall be col-

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lected by and belong to the Purchaser. All cash fees earned by the Seller during this period for services rendered by him or by the Purchaser to patients of the Seller shall be collected by the Seller, and shall remain the property of the Seller.

"5. ACCOUNTS RECEIVABLE. This sale shall include book accounts due the Seller in respect of his practice for services rendered prior to September 1, 1970. All such amounts received by the Purchaser from and after September 1, 1970, shall be the property of Purchaser."

6. RESTRICTIVE COVENANT. (Not pertinent to appeal.)

7. LEASE ASSUMPTION. (Not pertinent to appeal.)

On 9 October 1972, plaintiff instituted this action to recover for accounts receivable and for an accounting. He alleged that "on or about August 26, 1970" he entered into a contract with defendant for defendant to collect accounts receivable due plaintiff as a result of plaintiff's dental practice "up until on or about August 26, 1970". He further alleged that "on October 26, 1970" defendant reported to plaintiff that defendant had collected \$872 on plaintiff's accounts, paid to plaintiff \$600, and furnished plaintiff a list of those accounts still owing. Defendant answered denying all material allegations but admitting he had paid to plaintiff \$600. By his second defense, defendant averred that by agreement dated 1 September 1970, copy of which was attached to the answer as Exhibit A and incorporated in the second defense, plaintiff sold his dentistry practice to defendant including book accounts due plaintiff; that defendant had collected and retained certain book accounts. By his third defense, defendant set up a counterclaim against plaintiff for the \$600 collected by defendant on the accounts receivable which, he alleged, he had paid plaintiff by mistake.

Defendant then moved for summary judgment under Rule 56, Rules of Civil Procedure, both on plaintiff's action and defendant's counterclaim. As the bases of his motion he stated that the terms of the written agreement, copy of which was attached to his verified answer, were clear and unambiguous and that the \$600 was paid by mistake since plaintiff, by the terms of the contract, was clearly not entitled to the money.

In opposition to the motion, plaintiff filed his affidavit and the affidavit of his wife. By his affidavit, plaintiff avers

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that the sale did not include the accounts receivable but that the parties agreed "during the drafting and signing" of the agreement that purchaser would have to be given the legal right to collect the accounts since seller was leaving Greensboro; that it was agreed that the accounts would be transferred to purchaser who would collect them and retain for his own use 25% of the amounts collected. Plaintiff further averred that on 25 October (no year stated though the inference is that the year was 1970) the two went over the accounts in the office of purchaser and that purchaser gave seller a check for \$428 representing the total collected on accounts less certain expenses and purchaser's 25%. At that time, according to the affidavit, purchaser stated "he wanted no part of the accounts and was turning them back over to Dr. Corbin for collection"; that he gave plaintiff a list of those from whom he had not collected; that on 1 November 1970, plaintiff sent out bills to these persons and was surprised to learn that also on 1 November 1970, defendant had sent out mimeographed letters advising those persons that he had purchased plaintiff's practice by written contract and all future payments on accounts should be made to him. The affidavit of plaintiff's wife was to the same effect and in identical verbiage.

The court granted both motions. Plaintiff excepted to the granting of the motion for summary judgment on his cause of action, but did not except to the granting of the motion of the defendant's counterclaim for \$600.

J. C. Barefoot, Jr., for plaintiff appellant.

Younce, Wall and Suggs, by Percy L. Wall, for defendant appellee.

MORRIS, Judge.

Plaintiff has only one assignment of error based on the only exception appearing of record. The exception is to the court's finding "as a fact that there is no genuine issue of fact to be submitted to the trial court in connection with plaintiff's claim asserted and (sic) the complaint filed herein."

Plaintiff first argues that the court failed to consider "parol evidence which is admissible as completing and defining a vague contract." We do not argue with the principles of law espoused by plaintiff. He relies on *Root v. Insurance Co.*, 272

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N.C. 580, 583, 158 S.E. 2d 829 (1967), and quotes Justice Branch as having written for the Court:

"It is a well-recognized principle of construction that when the language of a contract is clear and unambiguous, the court must interpret the contract as written, *Parks v. Oil Co.*, 255 N.C. 498, 121 S.E. 2d 850, and 'The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.' *Sell v. Hotchkiss*, 264 N.C. 185, 141 S.E. 2d 259."

[1, 2] Plaintiff earnestly contends that it is obvious from his affidavit that the intention of the parties was that defendant collect the accounts receivable for the plaintiff. We are required first to look at the contract itself to ascertain the intention of the parties. Where the language is clear and unambiguous, the court is obliged to interpret the contract as written, *Root v. Insurance Co.*, *supra*, and cannot, under the guise of construction, "reject what parties inserted or insert what parties elected to omit". *Weyerhaeuser Co. v. Light Co.*, 257 N.C. 717, 719, 127 S.E. 2d 539 (1962). The contract before us is certainly not ambiguous. Rarely is a court asked to interpret an agreement as clear in its meaning as this one. The seller agreed to and did sell his dental equipment, furniture and fixtures to the purchaser for \$18,000. The parties agreed with respect to fees during an interim period during which purchaser and seller practiced together. They then agreed that seller's accounts receivable should be included in the sale and that all amounts received from that source from and after 1 September 1970, the date of the contract, should be the property of purchaser. Seller then agreed not to compete with purchaser in the City of Greensboro for a period of two years, and purchaser agreed to assume the obligations of seller under a lease agreement then existing. It would be difficult to imagine a contract containing less ambiguity. It is obvious that the parol evidence seller seeks to have considered is not competent as explaining or completing or defining a vague contract, nor is it admissible to show the intent of the parties.

Plaintiff takes the position that the court should have considered the evidence as showing the practical interpretation given the contract by the parties and, therefore, competent evi-

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dence of their intent. Again, "[p]arol understandings, although they induce the making of a written contract, are merged in the writing so that they cannot be used to change the contract or show any intent different from that expressed in the instrument." 17 Am. Jur. 2d, Contracts, § 261. The intent of the parties expressed by the entire contract is unambiguous. It is abundantly clear that the parties could have just as clearly expressed the intent for purchaser to collect the accounts for seller and pay the proceeds over to seller after retaining 25% for himself. This was not done, and the court could not properly consider any evidence which changed the intent of the parties as expressed in their written agreement.

[3] Alternatively, plaintiff urges that the court should have considered the evidence as showing an amendment to the contract by oral agreement. It is true that the parties to a contract may, by a later agreement, rescind a contract—in whole or in part—amend it in any respect, add to it, or replace it with a substitute, if the original contract remains executory and if the parties in their later agreement, act upon a sufficient consideration. 17 Am. Jur. 2d, Contracts, § 459. Here, at the time defendant says there was an amendment, the original contract was executory in at least one aspect—the time limit of the ancillary contract in restraint of trade had not expired. In all other respects, the contract was executed. Assuming that this is sufficient to meet the test, plaintiff's own proffered evidence shows there was no meeting of the minds sufficient to furnish supportive consideration. In order to create a binding amendment to the contract, the same meeting of the minds is necessary that was necessary to make the original contract. Here plaintiff says, by his affidavit, that defendant on 26 October 1972, gave him a list of patients from whom collection had not been effected and said he wanted nothing further to do with collecting the accounts. Plaintiff says further that on 1 November 1972 he learned that defendant had sent mimeographed notices to all these patients advising them to make payment to defendant since all accounts receivable had been transferred to defendant "by written contract". This clearly negates any meeting of the minds on an amendment to the written contract.

"Rendition of a summary judgment is, by the rule itself, conditioned upon a showing by the movant (1) that there is no genuine issue as to any material fact, and (2) that the moving party is entitled to a judgment as a matter of

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law. G.S. 1A-1, Rule 56(b); *Kessing v. Mortgage Corp.*, *supra* [278 N.C. 523, 180 S.E. 2d 823 (1971)]." *Williams v. Board of Education*, 284 N.C. 588, 599, 201 S.E. 2d 889, 896 (1973), and cases there cited.

Here defendant relied on the pleadings and the contract itself and was entitled to summary judgment, nothing else appearing. Plaintiff's affidavits in opposition did not negate defendant's showing; but, on the contrary, buttressed defendant's position that there is no genuine issue as to any material fact. The contract is clear and unambiguous. It is completely clear with respect to the intention of the parties. The court correctly refused to consider evidence of any parol agreement made contemporaneously with the contract nor did it err in failing to consider evidence of an alleged parol agreement amending the contract where there is no sufficient evidence of mutuality of assent to support the agreement.

Plaintiff does not take exception to nor appeal from that portion of the judgment awarding summary judgment on defendant's counterclaim for \$600. We note that by his complaint, plaintiff admitted that defendant had in fact, paid to him the sum of \$600. See *Pope v. Continental Insurance Co. of New York*, 161 Fed. 2d (C.C. App. 7th Cir.) 912 (1947). He again relies on the parol agreement made contemporaneously with the written contract.

We are of the opinion that plaintiff's assignment of error based upon his single exception is without merit.

Affirmed.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. ROY JOYNER

No. 7421SC704

(Filed 18 September 1974)

1. Municipal Corporations § 30— zoning ordinance — requirements for validity

A zoning ordinance of a municipality is valid and enforceable if it emanates from an ample grant of power by the legislature to the city

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or town, if it has a reasonable tendency to promote the public safety, health, morals, comfort, welfare and prosperity, and if its provisions are not arbitrary, unreasonable or confiscatory.

2. Municipal Corporations § 30— zoning ordinance — prohibition of building materials salvage yard — constitutionality

A municipal zoning ordinance which prohibited the operation of a building materials salvage yard within a defined area and allowed those engaged in such business in that area a period of three years to remove their business to another location was in the public interest, was not arbitrary, unreasonable or confiscatory, reasonably balanced public and private interests in requiring removal of nonconforming structures within three years and was therefore constitutional.

3. Municipal Corporations § 30— zoning ordinance — nonconforming use — applicability to defendant

Where defendant's evidence tended to show that it would cost him \$25,000 to move his business, there was nothing in the record to suggest that defendant could not have made a less costly move during the three year grace period provided by the ordinance, defendant testified that his inventory turned over in less than three years, and defendant entered into a long-term lease on the property after the effective date of the ordinance even though he was aware of the removal requirement in the ordinance, defendant failed to show that his loss would have been substantial had he complied with the ordinance.

APPEAL by defendant from *McConnell, Judge*, 22 April 1974 Session of Superior Court held in FORSYTH County.

Heard in Court of Appeals 28 August 1974.

Defendant was convicted in the District Court upon a warrant which charged the maintenance of a building materials salvage yard in violation of a zoning ordinance. He appealed to the Superior Court for a trial *de novo*.

The ordinance covering the location of defendant's business became effective 17 September 1968. It prohibited the operation of a building materials salvage yard within a defined area and allowed those engaged in such business in that area a period of three years to remove their business to another location. The pertinent portion of the ordinance reads as follows:

"G. Removal of Certain Nonconforming Uses Required:

1. The following uses, if they are or become nonconforming by virtue of the adoption of this ordinance or subsequent amendments thereto, shall be removed

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within three (3) years after the date of adoption hereof or of such amendment:

- a. Auto wrecking yards, building material salvage yards, scrap metal processing yards, and contractors' storage yards;
- b. Advertising signs in all districts except B-2, other than those advertising signs that are nonconforming only as to size or height."

In the Superior Court defendant made a motion to quash the warrant on the ground that the ordinance upon which it was based was unconstitutional. This motion was denied.

Evidence was then offered which was largely undisputed. The State showed that the defendant was continuing to operate his business after the time permitted for its removal despite repeated warnings by the building and zoning inspector.

Defendant testified that he began operating his business in 1966 under an oral lease of the real property and made some improvements. In 1968, after the adoption of the zoning ordinance, he entered into a written lease extending until 1979. He admitted that he could have disposed of his entire inventory in three years, but he was continuing to operate the business because "I do not like the fact that it [the provision for removal of nonconforming uses] applies to me by right." Defendant estimated that it would cost him \$25,000 to relocate his business at this time.

At the conclusion of the State's evidence and again at the conclusion of all the evidence defendant made a motion for nonsuit. These motions were denied.

The jury returned a verdict of guilty. From judgment imposed thereon, defendant appealed to this Court.

Attorney General Robert Morgan, by Assistant Attorney General Richard N. League, for the State.

Craige, Brawley, by C. Thomas Ross, for defendant appellant.

BALEY, Judge.

Defendant first assigns as error the failure of the court to grant his motion to quash the warrant on the ground that sec-

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tion G(1)(a) of the ordinance upon which the warrant was based is unconstitutional. Defendant does not question the validity of the entire zoning ordinance, only section G(1)(a), which provides for the termination of certain nonconforming uses within three years after the effective date of the ordinance.

A motion to quash tests the sufficiency of the warrant to charge a criminal offense. The failure to charge a criminal offense may be a deficiency in the allegations of the warrant or may be due to the unconstitutionality of the ordinance under which the charge is made. *State v. Atlas*, 283 N.C. 165, 195 S.E. 2d 496. In any event, however, the defect must appear on the face of the record. Upon a motion to quash a warrant charging the violation of an ordinance, the judge may not hear evidence or consider documents other than the specific ordinance involved. *State v. Underwood*, 283 N.C. 154, 195 S.E. 2d 489.

The warrant sets out the date when defendant continued to operate his building materials salvage business as "after September 17, 1971 thru the 11th day of May 1973," which was more than three years after the effective date of the ordinance. It is clear that a criminal offense is charged in the warrant if section G(1)(a) of the ordinance is a valid constitutional exercise of the power of the municipality.

[1, 2] We then reach the question of the validity of section G(1)(a) requiring the termination of certain nonconforming uses. Our North Carolina Supreme Court follows the general rule that "a zoning ordinance of a municipality is valid and enforceable if it emanates from [an] ample grant of power by the legislature to the city or town, if it has a reasonable tendency to promote the public safety, health, morals, comfort, welfare and prosperity, and if its provisions are not arbitrary, unreasonable or confiscatory." *Helms v. Charlotte*, 255 N.C. 647, 650-51, 122 S.E. 2d 817, 820; accord, *Blades v. Raleigh*, 280 N.C. 531, 187 S.E. 2d 35; *Schloss v. Jamison*, 262 N.C. 108, 136 S.E. 2d 691. See also *Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926). The power of the municipality to pass zoning ordinances is conferred by statute, G.S. 160A-381 and G.S. 160A-382. The municipal authorities have here determined that the elimination of building material salvage yards within the area occupied by defendant's business is in the public interest. There is nothing to indicate on the face of the ordinance that the provision for removal of the designated nonconforming uses within the time period provided is arbitrary, unreasonable, or confiscatory.

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Since future uses clearly can be prohibited under zoning ordinances, nonconforming uses which are permitted to continue constitute exceptions to the general zoning plan established by the ordinance for the neighborhood involved. Consequently, the private interests which they represent should be protected only to a limited extent and not to the point where the welfare of the public must suffer. "The police power is not static. It expands to meet conditions which necessarily change as business progresses and civilization advances." *Elizabeth City v. Aydlett*, 201 N.C. 602, 605, 161 S.E. 78, 79. See also Annot., 22 A.L.R. 3d 1134. When an ordinance deals with nonconforming uses, it is an attempt by the municipality to balance the right to use of private property with the paramount public interest.

Restrictions on the continuation of nonconforming uses will be enforced if reasonably designed to avoid loss to the owner and that prospective loss is relatively slight. They may not be enforced if such enforcement would cause serious loss to property owners and destroy valuable businesses built up over many years. As set out in *Los Angeles v. Gage*, 127 Cal. App. 2d 442, 460, 274 P. 2d 34, 44 (1954), "[t]he distinction between an ordinance restricting future uses and one requiring the termination of present uses within a reasonable period of time is merely one of degree, and constitutionality depends on the relative importance to be given to the public gain and to the private loss."

If a time limit for the continuation of a nonconforming use is not set out in the ordinance, it is assumed that the nonconforming use will terminate without governmental action. When a time limit for the removal of the nonconforming use is set, it must meet reasonable standards. The three year time period permitted for the removal of the nonconforming uses described in the present ordinance would seem to meet the test of reasonableness in the balance between public and private interests.

We hold that section G(1)(a) is constitutional and defendant's motion to quash the warrant was properly overruled.

[3] Defendant contends that, even if section G(1)(a) is not invalid *per se*, it is unreasonable as applied to him. He apparently has made no attempt to comply with the ordinance. Instead he has challenged its applicability to him on the ground that it is arbitrary and fails to consider the amount of his investment, the nature of the surrounding property and the cost of relocating his business.

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Conceding that it would now cost the defendant \$25,000 to move, there is nothing in the record to suggest that he could not have made a less costly move during the three year grace period. He testified that his inventory turns over in less than three years. Although he made improvements on the property prior to the enactment of the ordinance, he entered into a long-term lease on the property after its effective date. At this time he was aware of the requirement that nonconforming uses must be removed within three years and chose to ignore it. He admitted that he simply did not like the provision. "The law accords protection to nonconforming users, who, relying on the authorization given them, have made substantial expenditures in an honest belief that the project would not violate declared public policy. It does not protect one who makes expenditures with knowledge that the expenditures are made for a purpose declared unlawful by a duly enacted ordinance." *Warner v. W. & O., Inc.*, 263 N.C. 37, 43, 138 S.E. 2d 782, 786-87. Defendant has failed to show that his loss would have been substantial had he complied with the ordinance rather than acted in the face of it.

There being no conflicting evidence presented at the trial, the trial judge could properly consider the reasonableness of the ordinance upon defendant's motion for nonsuit. Under the facts of this case, the allowance of three years in which to relocate a salvage yard cannot be considered arbitrary, unreasonable, or confiscatory. Defendant's motion for nonsuit was properly denied.

Defendant's exceptions to the court's refusal to allow the building inspector to testify as to his opinion of the reasonableness of the ordinance or the amount of defendant's investment are without merit. Defendant himself testified as to his investment, and the reasonableness of the ordinance upon the uncontroverted facts presented was a question for the court.

The verdict of guilty reached by the jury under proper instructions from the court is fully sustained by the evidence.

No error.

Judges BRITT and HEDRICK concur.

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STATE OF NORTH CAROLINA v. JOHN DONALD RICHARDSON

No. 7421SC694

(Filed 18 September 1974)

1. Narcotics § 6— forfeiture of vehicle used in transporting marijuana

N. C. law subjects a vehicle which is found to have been used in the illegal transportation of narcotic drugs to immediate forfeiture; however, forfeiture may be defeated if the claimant can show the illegal use occurred without his knowledge or consent, with the claimant having the right to have a jury pass upon his claim. G.S. 90-112(a) (4); G.S. 18A-21(b); G.S. 90-113.1(a).

2. Narcotics § 6— vehicle forfeiture — notice and hearing prior to seizure

The N. C. vehicle forfeiture statute does not provide for notice or hearing prior to the seizing of the vehicle, but it does provide for notice and an opportunity to be heard subsequent to seizure. G.S. 18A-21(c).

3. Narcotics § 6— vehicle forfeiture — knowledge by owner of vehicle's use

In a proceeding for the remission of an automobile confiscated because of its use in transporting marijuana, evidence was sufficient to support the trial court's finding that petitioner knew that his son had been operating the vehicle in question with marijuana in it.

APPEAL by petitioner, Stephen Eli Richardson, from *McConnell, Judge*, 4 February 1974 Session of Superior Court held in FORSYTH County. Heard in the Court of Appeals of North Carolina 28 August 1974.

This proceeding was instituted by Stephen Eli Richardson, petitioner, for the remission of an automobile confiscated by an order of the Superior Court of Forsyth County pursuant to the provisions of G.S. 90-112(a) (4). After a hearing on the petition, the trial court made the following findings of fact and conclusions of law which sufficiently detail the factual situation giving rise to this cause:

I. The petition was filed by Stephen Eli Richardson, father of the above named defendant [John Donald Richardson] for the remission of a motor vehicle, said vehicle being a 1970 Volkswagen, identifying number 1102919687.

II. That title to the aforesaid vehicle was registered in the name of Stephen Eli Richardson since August 8, 1970.

III. That insurance on said vehicle was carried with Government Employees Insurance Company and listed the above named defendant as an operator of said vehicle.

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IV. On February 1, 1972, the above named defendant was arrested operating the said motor vehicle and charged with the possession of marijuana with the intent to distribute and said vehicle was seized but later returned to petitioner Stephen Eli Richardson. The above named defendant was convicted and given a sentence of one to three years and placed on probation, one of the conditions being a consent to search his person, premises, or motor vehicle.

V. On March 2, 1973, Officer E. P. Oldham stopped defendant driving the above mentioned 1970 Volkswagen being operated by the defendant, and pursuant to said consent to search, searched the said vehicle and found it to contain the controlled substance, marijuana. The defendant was not charged on this occasion, but the petitioner, Stephen Eli Richardson, was aware that his son had been found operating this vehicle with marijuana in it.

VI. Sometime shortly before May 9, 1973, Officer B. N. Walsworth, upon information that defendant had been convicted of possession of marijuana, stopped the said defendant operating the said Volkswagen and inquired of defendant as to who owned the 1970 Volkswagen to which defendant replied that it was registered in his father's name but that he was paying for it.

VII. On the 9th day of May, 1973, Officers Oldham and M. M. Choate observed the aforesaid 1970 Volkswagen being operated by the defendant and when they attempted to stop it, the defendant was seen to throw two plastic bags from the car, which contained the controlled substance, marijuana. The defendant was placed under arrest and charged with the possession of marijuana with the intent to distribute, a second offense and the said 1970 Volkswagen was seized.

VIII. On July 25, 1973, the Honorable Walter Crissman sentenced the said defendant to a term of three years upon his plea of guilty, but entered no order as to the 1970 Volkswagen.

IX. On August 13, 1973, the Honorable John D. McConnell entered an order without a hearing for forfeiting the said 1970 Volkswagen and turning it over to the City of Winston-Salem, N. C., to be used by the police department.

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Based upon the foregoing findings of fact, the Court concludes as a matter of law :

1. The 1970 Volkswagen was used in the unlawful concealment, conveyance and transportation of marijuana contrary to the provisions of North Carolina General Statutes 90-95(a) (1).

2. The said 1970 Volkswagen at all times was used with express consent of the petitioner, Stephen Eli Richardson, and was lawfully in the possession of the defendant, John Donald Richardson.

3. That the said 1970 Volkswagen was used in violation of North Carolina General Statutes 90-112 (a) (4) with the implied knowledge and consent of the petitioner, Stephen Eli Richardson."

From an order denying the petition, Stephen Eli Richardson appealed.

White and Crumpler by Melvin F. Wright, Jr., and Michael J. Lewis for petitioner appellant.

Attorney General Robert Morgan by Assistant Attorney General George W. Boylan for the State.

HEDRICK, Judge.

Petitioner contends the court erred in entering an order forfeiting his vehicle without giving him notice and hearing prior to the order of forfeiture.

Petitioner's vehicle was confiscated pursuant to G.S. 90-112 (a) (4) which subjects the following to forfeiture:

"All conveyances, including vehicles, vessels, or aircraft, which are used or intended for use to unlawfully conceal, convey, or transport, or in any manner to facilitate the unlawful concealment, conveyance, or transportation of property described in (1) or (2)"

G.S. 90-112(f) provides:

"All conveyances subject to forfeiture under the provisions of this Article shall be forfeited as in the case of conveyances used to conceal, convey, or transport intoxicating beverages."

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G.S. 18A-21 provides for the forfeiture of conveyances used in the illegal transportation of intoxicating liquors. G.S. 18A-21 (a) reads, in part:

“Whenever intoxicating liquor, or equipment or material designed or intended for use in the manufacture of intoxicating liquor, transported or possessed illegally, is seized by an officer, he shall take possession of the vehicle, motor vehicle, water or aircraft, or any other conveyance, and shall arrest any person in charge thereof.”

G.S. 18A-21(b) reads, in part:

“Unless the claimant can show that the vehicle or other conveyance seized is his property and that it was used in transporting liquor, or equipment or materials designed or intended for use in the manufacture of intoxicating liquor, without his knowledge and consent, with the right on the part of the claimant to have a jury pass upon his claim, the court shall order a sale by public auction of the property seized.”

G.S. 90-113.1(a) provides:

“It shall not be necessary for the State to negate any exemption or exception set forth in this Article in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this Article, and the burden of proof of any such exemption or exception shall be upon the person claiming its benefit.”

[1] Thus, North Carolina law subjects a vehicle which is found to have been used in the illegal transportation of narcotic drugs to immediate forfeiture. Forfeiture may be defeated if the claimant can show the illegal use occurred without his knowledge or consent, with the claimant having the right to have a jury pass upon his claim. See *State v. McPeak*, 243 N.C. 273, 90 S.E. 2d 505 (1955) and *State v. O’Hora*, 12 N.C. App. 250, 182 S.E. 2d 823 (1971), which construe former similar statutory provisions. The burden is statutorily placed upon the claimant to show the absence of consent or knowledge. G.S. 18A-21(b); G.S. 90-113.1(a).

[2] The North Carolina vehicle forfeiture statute admittedly does not provide for notice or hearing prior to the seizing of the vehicle. It does, however, provide for notice and an opportunity to be heard subsequent to seizure. G.S. 18A-21(c).

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Although the general rule is that procedural due process requires notice and an opportunity to be heard before there can be a denial of any vested property right or interest, courts have consistently upheld statutes that provide for the immediate seizure or forfeiture of vehicles that have been used in violation of the law. See, *United States v. Mills*, 440 F. 2d 647 (6th Cir. 1971), cert. denied, 404 U.S. 837, 30 L.Ed. 2d 70, 92 S.Ct. 127 (1971); *Weathersbee v. United States*, 263 F. 2d 324 (4th Cir. 1958); *Fell v. Armour*, 355 F. Supp. 1319 (M.D. Tenn. 1972); *C.I.T. Corporation v. Burgess*, 199 N.C. 23, 153 S.E. 634 (1930). Consequently, this assignment of error is found to be without merit.

[3] The petitioner next contends the court erred in finding as a fact that the petitioner, Stephen Eli Richardson, was aware that his son had been operating the automobile with marijuana in it on 2 March 1973.

"The court's findings of fact are conclusive if supported by any competent evidence and judgment supported by such findings will be affirmed, even though there is evidence contra or even though some incompetent evidence may also have been admitted." 1 Strong, N. C. Index 2d, Appeal and Error, Section 57, pp. 223-224 (footnotes omitted).

The record supplies sufficient, competent evidence indicating that petitioner was aware of the 2 March 1973 search of the Volkswagen and the results of that search. When asked by the District Attorney on cross-examination as to whether he was aware that his son had been picked up on 2 March 1973 driving the Volkswagen with marijuana in it, petitioner responded; "[H]ow much marijuana did they find in it? I didn't know it. I knew they found a piece of paper, burnt paper in there." Further testifying as to the 2 March 1973 search, the petitioner testified: "Now, this officer, what he is talking about is, they found eleven seeds and a piece of paper that you couldn't weigh and he is calling it marijuana. Well it wasn't marijuana seed." Continuing, petitioner testified: "That is where they found the marijuana seed there in the back. They didn't even find enough marijuana that they could weigh."

Thus, as shown above, the record amply supports the trial court's finding that petitioner knew that his son had been operating the Volkswagen in question with marijuana in it on

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2 March 1973. Therefore, it is our opinion that the finding of fact challenged by this exception is supported by the evidence; and this assignment of error is overruled.

The petitioner next contends the trial court erred in concluding as a matter of law that the petitioner's 1970 Volkswagen was used in violation of G.S. 90-112(a) (4) with the implied knowledge and consent of the petitioner. We do not agree.

As pointed out before in this opinion, the burden was on the petitioner to show that the vehicle in question was being used for the illegal transportation or concealment of narcotics without his knowledge and consent. This was a question of fact to be decided by the court or a jury. The court, by its findings and conclusions obviously decided that the petitioner had failed to carry the burden of proof. The findings of fact made by the trial judge are supported by the evidence in the record, and the findings support the conclusion that petitioner's son operated the motor vehicle "in violation of North Carolina General Statutes 90-112(a) (4) with the implied knowledge and consent of the petitioner, Stephen Eli Richardson."

We point out that G.S. 18A-21 (b) specifically provides that the claimant (petitioner) has the right to have a jury pass on his claim. However, in the instant case, no demand was made for a jury trial nor did petitioner object or except to the court's trying the issue.

Petitioner has additional assignments of error which we have carefully considered and find to be without merit. The order appealed from is

Affirmed.

Judges BRITT and BALEY concur.

Whitmire v. Savings & Loan Assoc.

ROBERT L. WHITMIRE, JR., AND BOYD B. MASSAGEE, JR., RECEIVERS
OF CROFT-GESNER, INC. v. FIRST FEDERAL SAVINGS & LOAN
ASSOCIATION OF HENDERSONVILLE AND BANK OF NORTH
CAROLINA, N.A.

No. 7429SC442

(Filed 18 September 1974)

1. Receivers § 9— action by receivers — construction loan funds — summary judgment

In an action by the receivers for an insolvent corporation to recover the balance of construction loan funds being held by defendant savings and loan association wherein defendants alleged that the corporation had assigned \$15,000 of such funds to defendant bank to secure payment of a loan to the corporation, the trial court properly denied defendant's motion for summary judgment where genuine issues of fact existed as to whether, at the time the corporation was placed in receivership, the houses for which the loans had been obtained had been completed or whether they were thereafter completed by someone else, whether the bank loan was made to the corporation's president as an individual rather than to the corporation, and whether the corporation had authority to pledge the construction loan proceeds as security for the bank loan.

2. Judgments § 37— res judicata — no adjudication on merits

Order entered in a receivership proceeding was not *res judicata* in an action by the receivers of an insolvent corporation to recover the balance of loan funds held by a savings and loan association for construction of houses by the corporation where the order did not purport to be an adjudication on the merits but expressly left the merits of the matter open for future adjudication.

3. Assignments § 1; Receivers § 9— action by receivers — construction loan funds — assignment — judgment on pleadings

In an action by the receivers of an insolvent corporation to recover the balance of loan funds held by defendant savings and loan association for construction of houses by the corporation, the trial court erred in the allowance of plaintiffs' motion for judgment on the pleadings where defendants alleged that, at the time the receivers were appointed, such right as the corporation had in the undisbursed construction loan funds was subject to an assignment to defendant bank to secure payment to it of a \$15,000 loan, since a valid assignment may be made of money to become due in the future and defendants are entitled to attempt to prove a valid assignment.

APPEAL by defendants from *Martin (Harry C.)*, Judge, 18 March 1974 Session of Superior Court held in HENDERSON County.

This action was brought by the receivers for an insolvent corporation, Croft-Gesner, Inc., to recover the balance of loan

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proceeds being held by First Federal Savings & Loan Association of Hendersonville. In their complaint, plaintiffs alleged: Prior to the receivership, Croft-Gesner, Inc. contracted with certain owners of lots in a subdivision in Henderson County to construct houses on the lots. Part of the funds with which the lot owners were to pay for the houses was obtained by them from loans from defendant First Federal. Periodic payments were made from the loan proceeds to Croft-Gesner, Inc., as construction progressed. All of the funds were not disbursed and some of these funds remain in the hands of First Federal. Under the contracts between Croft-Gesner, Inc. and the lot owners, payment of the balance of the proceeds was to be made upon completion of construction. Construction of the houses has been completed, and plaintiffs have requested First Federal to deliver the remaining proceeds from said loans to them to be disbursed to the creditors of Croft-Gesner, Inc., as provided by law. First Federal has refused to do so, and plaintiffs are informed that defendant Bank of North Carolina, N.A., claims that a purported assignment was made by Robert Croft to the Bank, and for this reason the Bank has objected to delivery of these funds by First Federal to the plaintiffs. Because of this, the Bank is made a party to this action.

Defendants filed answer in which they admitted that all of the funds from the loans had not been disbursed. As a defense, defendants alleged: Simultaneously with contracting with Croft-Gesner, Inc. for construction of the houses, the lot owners delivered to First Federal written authority to disburse the construction loan funds directly to Croft-Gesner, Inc., upon inspection by First Federal appraisers. Pursuant to this authority First Federal made various inspections and disbursements to Croft-Gesner, Inc. On 19 June 1972 Robert L. Croft, President of Croft-Gesner, Inc., applied to defendant Bank to borrow \$15,000.00 for the purpose of paying for materials purchased and used in construction of one of the houses. In connection with this transaction, First Federal agreed with the Bank that upon making final disbursements from the construction loans, the sum of \$15,000.00 would be paid jointly to Croft-Gesner, Inc. and the Bank for the purpose of paying the loan which the Bank was about to make to the contractor. The Bank made the loan for \$15,000.00 which became due in 30 days. Thereafter, Croft-Gesner, Inc., through its President, Robert L. Croft, authorized First Federal in writing to delete the name of Croft-Gesner, Inc., from the check First Federal was to make, and

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directed First Federal to deliver the check directly to the Bank. First Federal inspected the properties involved and was preparing to make the final disbursement and to execute the check for \$15,000.00 to the Bank, but before the check could be issued the receivership was in effect. Because of the receivership, First Federal withheld any payment to the Bank, but First Federal stands ready and willing to carry out its obligation to the Bank at any time the court approves. The Bank would not have made the \$15,000.00 loan except for the agreement with First Federal, and when this transaction occurred, neither defendant had any knowledge of the intention of anyone to place Croft-Gesner, Inc. in receivership.

As an additional defense, defendants alleged that the receivers had previously made a motion in the receivership proceeding for an order directing First Federal to pay the balance of the construction loans to the receivers upon satisfactory completion of each house and that on 26 February 1973 Judge Thornburg had denied the motion. Defendants pled Judge Thornburg's order as res judicata with respect to all claims in controversy in this case.

Defendants moved for summary judgment under Rule 56 of the Rules of Civil Procedure, supporting their motion by affidavits. This motion was opposed by plaintiffs, who filed a counter-affidavit. Plaintiffs moved for judgment on the pleadings under Rule 12(c).

The court denied defendants' motion for summary judgment, allowed plaintiffs' motion for judgment on the pleadings, and ordered First Federal to deliver to plaintiffs the balance of the construction loan funds remaining in its hands, the same to be held and disbursed by plaintiffs as may be subsequently ordered by the court. Defendants appealed.

Boyd B. Massagee, Jr. and Robert L. Whitmire, Jr., receivers, plaintiff appellees.

Redden, Redden & Redden by M. M. Redden for defendant appellants.

PARKER, Judge.

[1, 2] The court properly denied defendants' motion for summary judgment. In their answer defendants alleged that at the time Croft-Gesner, Inc. was placed in receivership, First Federal

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had inspected the properties involved and was preparing to make final disbursements of the loan proceeds and to execute and deliver the check for \$15,000.00 to the Bank. However, from the affidavit filed by plaintiffs in opposition to defendants' motion for summary judgment, it is evident that genuine issues of fact exist as to whether, at the time Croft-Gesner, Inc. was placed in receivership, the houses had been completed or whether they were thereafter completed by someone else. This affidavit further discloses that a genuine issue of fact may exist as to whether the \$15,000.00 loan was made by the Bank to Robert Croft as an individual rather than to Croft-Gesner, Inc., and as to whether Croft-Gesner, Inc. had authority to pledge the First Federal loan proceeds as security for the \$15,000.00 Bank loan. Until these issues of fact are resolved in defendants' favor, defendants would not be entitled to judgement on the merits as a matter of law. Nor were defendants entitled to summary judgment on their plea of res judicata. Examination of Judge Thornburg's order of 26 February 1973 which furnished the basis of defendants' plea reveals that, in addition to denying the receivers' motion, it directed First Federal not to disburse any remaining loan proceeds in its hands, "until the controversy involved is adjudicated or terminated according to law." Thus, the order did not purport to be an adjudication on the merits but expressly left the merits of the matter open for future adjudication. We see no reason why the present litigation is not an appropriate proceeding for that purpose. In any event, it is clear that Judge Thornburg's order does not foreclose this and that defendants were not entitled to summary judgment on their plea of res judicata. In the denial of defendants' motion for summary judgment we find no error.

[3] We do find error, however, in the allowance of plaintiffs' motion for judgment on the pleadings and in the order directing First Federal to deliver the remaining proceeds from the construction loans to the receivers. It is true that by express statutory provision "[a]ll of the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects, upon the appointment of a receiver, forthwith vest in him, and the corporation is divested of the title thereto." G.S. 1-507.3. However, "[i]n the very nature of things, the receiver takes the property of the insolvent debtor subject to the mortgages, judgments, and other liens existing at the time of his appointment." *Surety Corp. v. Sharpe*, 236 N.C. 35, 50, 72 S.E. 2d 109, 123 (1952). In the present

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case, defendants have alleged in their answer that at the time the receivers were appointed, such right as the insolvent corporation had in the undisbursed balances of the construction loans was subject to an assignment to the Bank to secure the payment to it of the \$15,000.00 loan. A valid assignment may be made of money to become due in the future, *Wike v. Guaranty Co.*, 229 N.C. 370, 49 S.E. 2d 740 (1948); *Bank v. Jackson*, 214 N.C. 582, 200 S.E. 444 (1939), and we see no reason why defendants are precluded from attempting to prove a valid assignment in this case. Whether they can successfully do so, and whether and in what manner the rights of the parties may be affected by the provisions of Article 9 of the Uniform Commercial Code, G.S. 25-9-101 et seq., can only be determined after the evidence is presented. We hold only that it was error to grant judgment for the plaintiffs on the pleadings.

Insofar as the order appealed from denies defendants' motion for summary judgment, it is affirmed. Insofar as it grants plaintiffs' motion for judgment on the pleadings and insofar as it directs First Federal to pay the balance of the construction loan proceeds to plaintiffs, it is reversed.

Affirmed in part.

Reversed in part.

Judges CAMPBELL and HEDRICK concur.

PRESTIGE FURNITURE CORPORATION, PLAINTIFF v. KING-HUNTER, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF v. STROUP SHEET METAL WORKS, INC., THIRD-PARTY DEFENDANT AND FOURTH-PARTY PLAINTIFF v. LLOYD A. FRY ROOFING COMPANY, FOURTH-PARTY DEFENDANT

No. 7418SC524

(Filed 18 September 1974)

Sales § 22— action based on defective materials — summary judgment

In a subcontractor's fourth-party action against the manufacturer of roofing materials to recover damages resulting from the defective condition of a roof installed by plaintiff, defendant manufacturer's motion for summary judgment was properly allowed where the pleadings alleged and the evidence tended to establish that the roof failure

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was due either to faulty design in the drainage system or to failure on plaintiff's part to install the roof in accordance with defendant's specifications, and where a bond executed by defendant obligated defendant to repair only damage caused by ordinary wear and tear of the elements.

APPEAL by Stroup Sheet Metal Works, Inc., from judgment of *Kivett, Judge*, 4 February 1974 Civil Session of Superior Court held in GUILFORD County.

On 1 April 1966 Prestige Furniture Company contracted with King-Hunter, Inc., a general contractor, for King-Hunter to construct a building for Prestige in accordance with plans and specifications which had been prepared by an architect selected by Prestige. On 5 April 1966 King-Hunter subcontracted with Stroup Sheet Metal Works, Inc. for Stroup to furnish all labor, material and equipment necessary for installation of the roof on the building in accordance with the applicable plans and specifications. In this connection, all parties agreed that Lloyd A. Fry Roofing Company GC-B-20 roofing material and specifications would conform to the architect's specifications for the roof.

The built-up roof was applied to the building by Stroup during August and September 1966, Stroup using for that purpose Fry roofing materials, and the roof was completed by Stroup on 6 September 1966. On 12 October 1966 Fry issued to Prestige its twenty-year bond in the amount of \$17,700.00 by which Fry guaranteed to Prestige, subject to certain conditions, that Fry would make at its expense, not exceeding in the aggregate the face amount of the bond, "any repairs or damage caused by ordinary wear and tear by the elements, that may become necessary to maintain said Fry guaranty Type Built-Up Roof (exclusive of flashing, metal work and insulating material) in a water-tight condition." Prior to issuing this bond, Fry obtained from Stroup an instrument dated 21 September 1966 by which Stroup certified to Fry that Stroup had completed the roof in accordance with Fry's specifications. By this instrument Stroup also agreed, in consideration of Fry furnishing the bond, that in event Fry should be called upon to make any repairs to the roof within a period of two years from date of completion, Stroup would, at its expense, "make all necessary repairs if repairs are required, cut and repair any blisters or buckles and if the trouble is not due to defects in the Fry materials applied on said roof, [Stroup] at its own expense will

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do all things necessary to repair any defects to the satisfaction of the owner." The roof leaked, and during 1968 and 1969 Stroup did make numerous repairs, despite which the roof continued to leak.

On 9 September 1969 Prestige brought this lawsuit against the general contractor, King-Hunter, alleging that in the installation of the roof the Fry specifications GC-B-20 were not complied with and for that reason it would be necessary, in order to correct the defective condition of the roof, to remove all of the roofing material and to replace it with new material at a cost of at least \$40,000.00. Prestige sought to recover damages in that amount (later by amendment increased to \$49,408.00) from King-Hunter. King-Hunter filed answer, alleging that the roof had been completed in substantial accordance with the contract specifications and that any defects in the roof were caused by defects in the architectural plans. As part of its answer, King-Hunter filed a third-party complaint against Stroup alleging that if Prestige was entitled to recover anything against King-Hunter, then Stroup should be liable over to King-Hunter for the amount of such recovery. Stroup in turn filed answer to the third-party complaint of King-Hunter, alleging that upon completion of the roof the same had been inspected and accepted by the architect as agent for Prestige and that by accepting the guaranty bond from Fry, Prestige agreed that it looked to Fry to repair defects in the roof and thereby discharged Stroup from further responsibility. As part of its answer, Stroup asked that Fry be made a party and alleged that Fry's agents had also inspected the roof, that after such inspection Fry had issued the bond, and if Prestige should recover against King-Hunter and if King-Hunter should recover against Stroup, Fry should be held liable over to Stroup for the amount of such recovery. Fry answered Stroup's claim, denying that its guaranty bond was issued as a result of any inspection by its agents and alleging that the bond was issued solely upon representation of Stroup that the roof had been applied strictly in accordance with specifications. As further defenses, Fry alleged that damages specified in Prestige's complaint arose from causes other than ordinary wear and tear by the elements to which Fry's liability was restricted by the bond, that conditions of liability contained in the bond had not been complied with, that Stroup had failed to comply with the Fry specifications in installing the roof, and that the damages specified in Prestige's complaint

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were substantially caused by inadequate design of the roofing and drainage system for which Fry was in no way responsible.

While this action was pending and in the summer of 1970 the roof installed by Stroup was removed by Prestige and replaced by a new roof at a cost to Prestige of \$49,408.00. Upon motion by Fry, Stroup's action against Fry was severed from the remainder of the case until the issues raised among the original three parties should be resolved. The issues as to the original three parties came on for trial at the 19 April 1971 session of Superior Court in Guilford County, resulting in a jury verdict finding in favor of Prestige and awarding Prestige damages against King-Hunter in the amount of \$45,500.00, and awarding King-Hunter damages in the same amount against Stroup. The court in its discretion set aside the verdict. Thereafter, Prestige, King-Hunter and Stroup reached an agreement of settlement and Prestige and King-Hunter, by instrument dated 30 June 1972, assigned all of their rights, title and interest in the litigation to Stroup.

On 8 August 1973 Fry, the fourth-party defendant, filed motion for summary judgment dismissing Stroup's action against Fry on the ground that there was no genuine issue as to any material fact and that Fry was entitled to judgment as a matter of law. In support of this motion, Fry filed a transcript of the testimony and evidence presented at the trial which had taken place on the issues among the three original parties at the 19 April 1971 session of Superior Court together with certain other documents, the authenticity of which had been admitted by Stroup. The court allowed Fry's motion for summary judgment, and Stroup appealed.

Alsbaugh, Rivenbark & Lively by James B. Rivenbark for Stroup Sheet Metal Works, Inc., appellant.

Smith, Moore, Smith, Schell & Hunter by David M. Moore II for Lloyd A. Fry Roofing Company, appellee.

PARKER, Judge.

The motion for summary judgment was properly allowed. Nowhere in any of the voluminous pleadings in this case has any party alleged that the failure of the roof was in any way due to any defect in the materials manufactured by Fry or in Fry's specifications for installing those materials. Indeed, insofar

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as allegations in the pleadings are concerned, failure of the roof was due either to faulty design in the drainage system or to failure on the part of Stroup to install the roof in accordance with the applicable Fry specifications. All of the testimony and evidence which was presented at the trial which took place among the three original parties was directed to establish one or the other of those causes for failure of the roof, for neither of which was Fry in any way responsible. No genuine issue has been presented that the roof failure was in any way caused by defect in the Fry materials or in its specifications for application of those materials.

This leaves as the only ground upon which Stroup seeks to rest its claim for recovery against Fry the execution and delivery by Fry to Prestige of the twenty-year bond. By its terms, this bond runs only in favor of Prestige and not to any other party. Thus, any right which Stroup may have under this bond could only be such as Stroup may have obtained from Prestige by virtue of the written instrument dated 30 June 1972 by which Prestige assigned to Stroup all of its rights, title and interest in this civil action. It should be noted that in this action Prestige asserted no rights as against Fry, either under the bond or otherwise, and it is questionable whether any rights under the bond were transferred to Stroup. However that may be, and even if it be conceded that Stroup as assignee of Prestige has such rights against Fry as Prestige may have had under the bond, summary judgment dismissing Stroup's action was still proper. By the terms of the bond Fry obligated itself to repair only damage "caused by ordinary wear and tear by the elements," and no genuine issue has been raised that the damages were due to the causes referred to in the bond.

The judgment appealed from is

Affirmed.

Judges CAMPBELL and VAUGHN concur.

State v. Lindley

STATE OF NORTH CAROLINA v. BARRY DEAN LINDLEY

No. 7419SC606

(Filed 18 September 1974)

1. Criminal Law § 64— under influence of drugs — opinion of lay witness

A highway patrolman was properly allowed to testify to his opinion that defendant was under the influence of some type of drug notwithstanding there was no showing that the witness had any experience in such matters.

2. Criminal Law § 88— exclusion of repetitious cross-examination

In a prosecution for driving while under the influence of drugs, defendant was not prejudiced when the court sustained an objection to the broadside and repetitious question asked by defense counsel on cross-examination of the arresting officer as to whether the officer had eliminated all the other possible causes of defendant's impairment.

3. Criminal Law § 122— failure of jury to agree — additional instructions — comment by court — no expression of opinion

Where the jury was unable to agree on a verdict before the evening recess, the trial court's instructions on the continuation of deliberations the following day, including the comment, "How come everybody got so stubborn? That other jury hasn't agreed yet," did not constitute an expression of opinion as to what the verdict should be and were not coercive when considered as a whole.

Judge VAUGHN dissenting.

APPEAL by defendant from *Crissman, Judge*, 11 March 1974 Session of Superior Court held in RANDOLPH County.

Defendant was charged by warrant with operating a motor vehicle on a public highway while under the influence of drugs in violation of G.S. 20-139(b). He was convicted in the district court and appealed to the superior court for trial de novo. The only witness at the trial in the superior court was the arresting officer, a highway patrolman who had been employed by the N. C. Highway Patrol for five years. This witness in substance testified:

On Sunday afternoon, 13 May 1973, the officer responded to a complaint that automobiles were blocking a public road which runs beside an abandoned rock quarry used by young people as a swimming hole. On arriving at the scene, he asked everybody to come out and remove their cars from the roadway. He saw defendant driving a car up the road, narrowly missing a bridge railing and weaving from one side to the other. At the

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officer's request, defendant stopped and got out of his car. Defendant was very unsteady on his feet, the pupils of his eyes were contracted, "almost pinpoint," and there was some white substance on his lips. Two boys and a girl in the car with defendant were in the same condition. The officer arrested defendant for driving under the influence of alcohol and took him in the patrol car to the Randolph County jail. At the jail in Asheboro, defendant was given physical dexterity tests, which he was unable to perform. When asked where he thought he was, defendant responded that he was in Siler City. Defendant lives in Siler City, but was arrested outside of Liberty, about ten miles from Siler City. Defendant told the officer he had had two and a half to three cans of beer that afternoon, and asked to be given a breathalyzer test. However, while driving to jail with defendant in the patrol car, the officer could not smell alcohol on defendant's breath, and the officer refused to give defendant a breathalyzer test when it became apparent that defendant had not been drinking.

In the officer's opinion the defendant was under the influence of some type of drug at the time the officer saw him driving. Asked by the solicitor to summarize upon what he based that opinion, the officer testified:

"On the way he drove his car, the way he walked, acted, talked. He was incoherent at times. His eyes were contracted. His pupils rather were contracted. He seemed to be in a daze, in a stupor."

No drugs were found on defendant's person nor was any search made of his automobile or of the other persons in the automobile.

The jury found defendant guilty. Judgment was entered imposing a suspended sentence. Defendant appealed.

Attorney General Robert Morgan by Assistant Attorneys General H. A. Cole, Jr. and Thomas B. Wood for the State.

Dark & Edwards by Phil S. Edwards for defendant appellant.

PARKER, Judge.

[1] Defendant first assigns as error the court's ruling allowing the officer to testify to his opinion that defendant was

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under the influence of some type of drug. In this connection defendant points out that there was no showing that the witness had any expertise in such matters. However, our Supreme Court has held that a lay witness may state his opinion as to whether a person is under the influence of drugs when the witness has observed the person and such testimony is relevant to the issue being tried. *State v. Cook*, 273 N.C. 377, 160 S.E. 2d 49 (1968); *State v. Fletcher*, 279 N.C. 85, 181 S.E. 2d 405 (1971). On authority of those decisions, defendant's first assignment of error is overruled.

[2] Defendant's second assignment of error is that the court erred in not allowing defendant's attorney to cross-examine the officer concerning other possible causes of defendant's impairment. On cross-examination the officer admitted that he did not eliminate the possibility that defendant might have had an inner ear infection, but then testified that he had asked the defendant if he had diabetes, if he had any physical defects, if he was sick, if he limped, if he had been injured, if he had seen a doctor or dentist lately, or if he had been taking any kind of medication, to all of which questions defendant had answered "no." Only after this testimony did the court sustain an objection when defendant's counsel asked the officer whether he had eliminated "all the other possibilities."

Control over the manner and extent of cross-examination is a matter within the sound discretion of the trial court, and its rulings in this regard should not be disturbed except when prejudicial error is made to appear. *State v. Diaz*, 14 N.C. App. 730, 189 S.E. 2d 570 (1972). In the present case no attempt was made to place in the record what the witness would have said had he been permitted to answer, and we can see no way in which defendant could have been prejudiced when, after permitting extensive cross-examination, the court finally sustained an objection to the broadside and somewhat repetitious question asked by defendant's counsel. Defendant's second assignment of error is overruled.

[3] The next assignment of error discussed in defendant's brief relates to a remark made by the trial judge after the case had been submitted to the jury. The jury had commenced deliberations and the judge called them back into the courtroom for

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the evening recess. After ascertaining that they had not agreed on a verdict, the judge said:

“Well, I guess you want to go to supper now, don’t you? Maybe you will feel better in the morning, fresh and be able to agree on something. How come everybody got so stubborn? That other jury hasn’t agreed yet.

“I hope you will weigh and consider everything and the law that the court gave you, and be able to agree some way in the morning. We will let you go today. Don’t talk to anybody about the case. Don’t let anybody talk to you. Don’t talk to each other, if any of you happen to be together. Come back in the morning and go directly to that same jury room, and when all twelve are present, you begin your deliberations. Do what you think is right based upon the evidence and the law that the court gave you. That is all anybody wants you to do.”

Defendant contends that by this statement the court intimated that the jury should have already found him guilty and that not to have done so was stubbornness on their part. The court’s statement, however, expressed no opinion as to what the jury’s verdict should be, nor was the statement, when considered as a whole, in any way coercive. This assignment of error is also overruled.

The evidence in this case, considered in the light most favorable to the State, was sufficient to require submission of the case to the jury, and defendant’s assignments of error directed to the denial of his motions for nonsuit are overruled.

In defendant’s trial and in the judgment appealed from we find

No error.

Judge CAMPBELL concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting:

I am not firmly committed to the notion that a lay witness, after stating in detail all the relevant and specific facts observed by him, should not be allowed to state his conclusion based on

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those facts for whatever weight, if any, the jury may elect to attach to it. As a practical matter I doubt that the results at trial would be affected if all rules to the contrary were discarded.

Given however, that we do recognize a concept called the "opinion rule," I must dissent from the view of the majority that the decisions in *Cook* and *Fletcher* require us to hold, without qualification, and contrary to the great weight of authority in this country, that any witness may testify that in his opinion a defendant was under the influence of drugs. As to this question, the law of *Cook* and *Fletcher* appears to be only that in those cases the admission or exclusion of the lay opinion did not constitute prejudicial error so as to require a new trial.

The issue is squarely presented in the case at bar. There is no evidence that the witness had ever seen anyone known to be under the influence of drugs or that he was aware of any symptoms a person under the influence of drugs might display. On the record he was without experience or training relating to drugs. He had never seen defendant before the occasion of the arrest. In my view defendant's first assignment of error is well taken and there should be a new trial.

STATE OF NORTH CAROLINA v. JESSE JOHNSON AND JAMES
HENRY COLLINS

No. 7420SC621

(Filed 18 September 1974)

1. Criminal Law § 26— one act — two offenses

The same act may constitute two or more offenses which are distinct from each other, and in such cases the accused may be separately prosecuted and punished for each.

2. Criminal Law § 26; Robbery § 2— same evidence rule — double jeopardy

Where the facts alleged in a second indictment, if given in evidence, would have sustained a conviction under the first indictment, or where the same evidence would support a conviction in each case, the "same evidence" rule can be applied to show double jeopardy; however, that rule was not applicable in this armed robbery case where defendants had previously been tried and found guilty of robbing one victim, and they were subsequently tried for robbery of a second victim.

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3. Criminal Law § 26; Robbery § 2— robbery of two people — separate offenses

The armed robbery of each of two people was a separate and distinct offense for which defendants could be prosecuted and punished.

4. Criminal Law § 66— identification testimony — leading questions on voir dire

The trial court did not err in permitting leading questions in the voir dire examination of two witnesses as to their identification testimony.

5. Criminal Law § 66— in-court identification of defendants — observation at crime scene as basis

Evidence was sufficient to support the trial court's finding that an in-court identification of defendants was based on the witnesses' observations at the crime scene where such evidence tended to show that the crime occurred in a well-lighted building, the witnesses were in the presence of defendants for approximately ten minutes, and the witnesses viewed the full face of each defendant.

6. Criminal Law § 93— order of proof — discretionary matter

It is within the discretion of the trial judge to permit, in the interest of justice, the examination of witnesses at any stage of the trial, and this discretion to determine the order of testimony will not be interfered with unless it is abused.

7. Criminal Law § 80— reference by witness to notes

A law enforcement agent may properly use notes taken during an investigation to improve his recollection as to specific dates and details of an investigation.

APPEAL by defendants from *Seay, Judge*, 11 March 1974 Session of Superior Court held in RICHMOND County.

Defendants Jesse Johnson and James Henry Collins were indicted for armed robbery.

Evidence for the State tended to show the following. On 10 July 1973, Bill Little and Annie Lou Pratt drove the defendants, Jesse Johnson and James Henry Collins to an establishment known as Rib's Place in Windblow, North Carolina. En route the group stopped at the home of June Moore where Collins got a shotgun.

The group arrived at Rib's Place at approximately 8:00 p.m. Shortly thereafter Little and Pratt left, noticing that defendant Collins and Walter Pergues had guns.

Inside Rib's Place, Jimmy Dunn, victim of the robbery, was sitting at a booth with Jimmy Frye and Arthur Duke. Dunn looked up and saw a shotgun in the hand of Collins. The men

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were ordered to file behind the counter where they were bound with tape. The defendants then took Dunn's wallet and retrieved his social security card, driver's license, \$3.00 in currency and other things located therein.

One of the robbers asked, "You want to kill them now?" to which Collins replied, "No, we don't want to hurt the boys." The men left in a Thunderbird, having taken the keys from Duke. The automobile was later found in a lake behind Bill Little's house.

Both Dunn and Frye observed defendants for approximately ten minutes in the well-lighted room. Dunn testified that he came within a couple of feet of defendants. Frye came within 6 inches of defendant Collins and observed Johnson some 12-15 feet away. Both Dunn and Frye made positive in-court identifications.

Among the evidence offered by defendants was the testimony of Annie Ruth Collins, defendant Collins' sister. She stated that her brother was asleep on her porch during the hours of the alleged robbery and that defendant Johnson was inside her house that same evening until about 9:00 p.m., when he left to go to her sister's house.

Fulton Junior Moore denied that he ever saw defendant Collins get a shotgun at his house. This was contradicted by the State, when SBI agent Van Parker testified that Moore had told him earlier that defendant Collins asked his permission to use his shotgun.

Upon a verdict of guilty as charged, defendants were sentenced to a prison term of not less than 25 nor more than 30 years. This sentence is to run consecutively to any sentence previously imposed.

Attorney General Robert Morgan by Thomas B. Wood, Assistant Attorney General, for the State.

Leath, Bynum & Kitchin by Henry L. Kitchin for defendants.

VAUGHN, Judge.

Defendant's first contention on appeal is that the trial court erred in trying defendants for this count of armed robbery when defendants had been previously found guilty of another armed robbery which occurred at the same time and place.

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[1] It is well-settled that the "same act may constitute two or more offenses which are distinct from each other" and that in such cases "the accused may be separately prosecuted and punished for each." 1 Wharton's Criminal Law, § 394, pp. 537-8. See *State v. Nash*, 86 N.C. 650; *State v. Gibson*, 170 N.C. 697, 86 S.E. 774.

The defendants were charged on three counts of robbery, all of which occurred at the same time and place. In a trial on 12 November 1973, defendants were found guilty of armed robbery of James Frye. Now the defendants are being tried for the armed robbery of Jimmy Dunn. The second indictment under which defendants are now being tried is identical to the first except for the victim and the property taken.

The discussion of this contention of double jeopardy presents two questions: (1) whether the "same evidence" rule can be applied to show double jeopardy and (2) whether the acts of armed robbery do constitute the "same offense."

[2] The same evidence test is defined in *State v. Hicks*, 233 N.C. 511, 516, 64 S.E. 2d 871, 875, as follows: "Whether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first indictment [citations], or whether the same evidence would support a conviction in each case [citations]."

When applying this test to the case at bar, we find that the same evidence would not support a conviction in each case. Evidence of a robbery of property from the first victim will not support a conviction of a robbery of different property from a different victim. This is analogous to the situation in *Hicks*, wherein Justice Ervin wrote that evidence of conspiracy to damage or injure property owned or used by the Duke Power Company would not support a conviction of a conspiracy to damage or injure property owned or used by Jefferson Standard Broadcasting Company. *State v. Hicks, supra*, at 517, 64 S.E. 2d at 875.

In *State v. Ballard*, 280 N.C. 579, 186 S.E. 2d 372, the Supreme Court applied the same evidence test and determined that defendants had been twice put in jeopardy. That case is distinguishable from the case at bar.

In *Ballard*, the rationale was that "... when the lives of all employees in a store are threatened and endangered by the

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use or threatened use of a firearm incident to the theft of their employer's money or property, a single robbery with firearms is committed." *State v. Potter*, 285 N.C. 238, 253, 204 S.E. 2d 649, 659. In the case at bar, the persons threatened were not employees of one employer victimized by the taking of the employer's property. Each person threatened was a victim, each being robbed of his personal property.

As to the "same offense" doctrine in *Potter*, *supra*, the majority held that verdicts of guilty in an armed robbery of two cash registers manned by separate employees of a food market were to be considered as a single verdict of guilty of armed robbery. In so finding the Court limited its holding to a situation in which there is "the use or threatened use of a firearm incident to the theft of their employer's money or property." *State v. Potter*, *supra*, at 253, 204 S.E. 2d, at 659. The Court expressed no opinion as to a factual situation in which the robber takes money or property of an employee or customer.

[3] Here defendants threatened the use of force on separate victims and took property from each of them. They were not employees. It was not the employer who was robbed. Rather each separate victim was deprived of property. The armed robbery of each person is a separate and distinct offense, for which defendants may be prosecuted and punished.

[4] Next, we consider the defendant's allegation that it was error for the Court to permit leading questions in the *voir dire* examination of witnesses Frye and Dunn as to their identification testimony. "The trial court has discretionary authority to permit leading questions in proper instances [citation]." *State v. Bass*, 280 N.C. 435, 448, 186 S.E. 2d 384, 393. Further, "the rulings of the judge on the use of leading questions are discretionary," and such rulings are "reversible only for abuse of discretion." 1 Stansbury, N. C. Evidence (Brandis Revision) § 31. Also see *State v. Bass*, *supra*, at 448, 186 S.E. 2d, at 393.

In *Bass*, the North Carolina Supreme Court held that the trial judge's decision to permit leading questions asked by the solicitor in examining a rape victim on *voir dire* as to identification testimony was permissible and showed no abuse of discretion.

[5] The third contention of defendant is that the Court erred in finding that the in-court identification of defendants by the witnesses was based solely upon their observation of defendants

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at the place of the alleged crime. The trial judge conducted a *voir dire* examination and found the identification to be of independent origin. That finding was fully supported by the evidence.

The robbery occurred inside a well-lighted building. It was not yet dark and the lights were on inside the building. Both witnesses testified that they were in the presence of defendants for approximately ten minutes and that they viewed the full face of each defendant. At one point, witnesses were within one foot of one of the defendants. Such "findings of facts by the trial judge are conclusive when, as here, they are supported by competent evidence. [citations]." *State v. Bass, supra*, at 445, 186 S.E. 2d, at 391. We find no error in the trial court's ruling on this issue.

[6] Fourthly, the defendant contends that the Court erred in permitting the testimony of William Little claiming it constituted improper rebuttal evidence. It appeared to have rebuttal value to the testimony elicited from defendant's witness immediately preceding Little. But even assuming that we did not find Little's testimony to be in the nature of rebuttal, there would not necessarily be error, for the question of rebuttal testimony is generally subject to the sound discretion of the trial court. *Williams v. U. S.*, 151 F. 2d 736. It is within the discretion of the trial judge to permit, in the interest of justice, the examination of witnesses at any stage of trial. *State v. King*, 84 N.C. 737. This discretion to determine the order of testimony will not be interfered with unless it is abused. *State v. Stancill*, 178 N.C. 683, 100 S.E. 241.

[7] Finally, defendant cites as error the Court's allowing SBI Agent Parker to refer to his notes while testifying. A law enforcement agent may properly use notes taken during an investigation to improve his recollection as to specific dates and details of an investigation. In addition, there are a number of cases supporting the proposition that while a witness may usually speak from memory, he may refer to paper, memoranda or other written instruments to refresh his memory. *State v. Peacock*, 236 N.C. 137, 72 S.E. 2d 612; *Steele v. Cowe*, 225 N.C. 726, 36 S.E. 2d 288. It is permissible for the witness to refer to his notes when he cannot properly recall events. See *State v. Staton*, 114 N.C. 813, 19 S.E. 96. See 1 Stansbury, N. C. Evidence (Brandis Revision) § 31.

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Careful consideration of each of defendant's assignments or error having been given, we find no error.

No error.

Judges CAMPBELL and PARKER concur.

CLARENCE O. SHIPTON AND DORIS L. SHIPTON v. WILLIAM J. BARFIELD AND SARAH W. BARFIELD, ROBERT S. CAHOON, TRUSTEE, THE NORTHWESTERN BANK AND STARMOUNT COMPANY

No. 7418SC622

(Filed 18 September 1974)

1. Reformation of Instruments § 3— standing to maintain action — parties in privity

Only the original parties to a written instrument, or persons claiming under them in privity, have standing to maintain an action for reformation, and strangers to the chain of title to a lot on which an alleged mistaken restriction was placed are not in privity to such an instrument.

2. Reformation of Instruments § 3— standing to maintain action

Plaintiffs were without standing or authority to force an action to reform the deed from defendant developer to the Barfields' predecessors, since there was no privity between plaintiffs, who were adjacent landowners to the Barfields, and any defendants.

3. Deeds § 20— subdivision — enforcement of restrictive covenants

Where land within a given area is developed in accordance with a uniform scheme of restriction, ordinarily anyone purchasing in reliance on such restriction may sue and enforce the restriction against any other lot owner taking with record notice.

4. Deeds § 19— restrictive covenants — strict construction

Restrictions in derogation of the free and unfettered use of land are strictly construed in favor of the unrestricted use of property.

5. Deeds § 20— subdivision — restrictive covenants — no covenant to enforce

There was no basis to infer from the language of restrictive covenants in the deed from Starmount Company to the Barfields' predecessors in title that the defendant Starmount Company intended to covenant that it would enforce restrictive covenants and thus protect the interests of the plaintiffs who were adjacent landowners to the Barfields.

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APPEAL by plaintiffs from *Kivett, Judge*, 25 March 1974 Session of Superior Court held in GUILFORD County, Greensboro Division. Heard before the Court of Appeals 28 August 1974.

In this action, instituted on 12 April 1973, the plaintiffs seek, among other things, damages against the defendant Starmount Company for its failure to take the necessary legal action to reform a deed alleged to contain a mistake in the restrictive covenants of said deed from Starmount Company to the defendant Barfields' predecessors in title. They also seek damages for Starmount's failure and refusal to enforce a restriction in its deed covering the Barfields' lot by approving plans and specifications for the construction of a residence on the lot which is in alleged violation of certain restrictions in the deed.

The plaintiffs, in their complaint, allege that the facts in the case are the following:

(1) That the plaintiffs, by deed dated 16 September 1955, purchased a lot in Section 3 of Friendly Acres Subdivision from C. E. Tickle and wife. The plaintiffs thereafter built a home on this lot and have since continued to live there;

(2) That by a deed dated 10 August 1972, the defendants Barfield purchased a lot adjacent to the property of the plaintiffs. Title to this lot was derived through mesne conveyances from defendant Starmount Company by a deed to Poole and wife registered 16 March 1949;

(3) That both pieces of property in this suit were originally owned by defendant Starmount Company, which is engaged in the real estate business. These lots were sold as part of a development called Friendly Acres;

(4) That the original deed out of defendant Starmount Company to the Barfields' predecessors in title contained the following restrictive covenants:

(a) Paragraph 1 —

"No building shall be erected or allowed to remain on said property within their feet of the property line on the street or road abutting the front of said property"

(b) Paragraph 4 —

"No building of any kind shall be erected or allowed to remain on said property until the plans and specifi-

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cations have been submitted and approved in writing by the Starmount Company."

(c) Paragraph 6 —

"Said property shall not be subdivided into lots having less than 15,000 square feet of area or a width of less than 75 feet, nor shall any building be erected on any part of said property having an area of less than 15,000 square feet or a frontage of less than 75 feet."

(5) That in August 1972, the Barfields commenced construction of their house located approximately 50 feet from the property line adjoining the road abutting the front of their property;

(6) That all or substantially all of the deeds from defendant Starmount Company to purchasers of lots within the subdivided area in question contain a setback restriction of 125 feet;

(7) That in paragraph 1 of the Barfield restrictions above, the word "their" was inserted in the blank space provided by an alleged mutual mistake of the Starmount Company and the Barfields' predecessors and that in all other deeds the number 125 or 100 precedes the word "feet";

(8) That the lot of the Barfields is less than 75 feet in average width in alleged violation of the restrictions in paragraph 6 above;

(9) That the Barfields failed to submit plans for construction prior to commencement of said construction which is in alleged violation of paragraph 4 above;

(10) That the defendant Starmount Company, on information and belief, knew or should have known that the insertion of the word "their" in the form deed to the Barfields' predecessors, was a mistake;

(11) That the plaintiffs informed the defendant Starmount Company of said alleged mistake and that the defendant Starmount Company has failed and refused to take the necessary steps to reform said deed; and,

(12) That the defendant Starmount Company has failed and refused to enforce the restrictions in paragraphs 4 and 6 above by approving plans and specifications for construction.

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The defendant Starmount Company filed a motion pursuant to North Carolina Civil Procedure Rule 12(b) (6) that the action be dismissed on the ground that the complaint did not state a claim upon which relief could be granted as to said defendant. The court, after hearing arguments by counsel, granted the motion in favor of Starmount Company and judgment was entered, whereupon the plaintiffs excepted and served notice of appeal to this Court.

Smith, Carrington, Patterson, Follin & Curtis by Marion G. Follin III for plaintiff appellants.

McLendon, Brim, Brooks, Pierce & Daniels by G. Neil Daniels for defendant appellee.

CAMPBELL, Judge.

The plaintiffs contend that the trial court erred in granting the defendant Starmount's motion to dismiss under Rule 12(b) (6) because Starmount Company was legally obligated to enforce the covenants in the deed to the Barfields' predecessors and to seek reformation of covenants alleged to have been entered into by mutual mistake.

[1] It is established that only the original parties to a written instrument, or persons claiming under them in privity, have standing to maintain an action for reformation. Strangers to the chain of title to a lot on which an alleged mistaken restriction was placed are not in privity to such an instrument. *Hege v. Sellers*, 241 N.C. 240, 84 S.E. 2d 892 (1954). In *Hege, supra*, all lots in a subdivision, except one, were sold with substantially uniform restrictions attached. The plaintiff, in a suit against the developer and his grantee, sought to impose the uniform restrictions on the grantee from whose deed the restrictions were omitted by alleged mistake. Finding no privity between any of the plaintiffs and the defendants, the court affirmed the nonsuit.

[2] The facts as proposed by the plaintiffs here are not distinguishable from that of *Hege, supra*, except to the extent that there was an alleged mistaken omission in *Hege, supra*, and there was an alleged mistaken insertion of a provision in the deed here. The type of alleged mistake is irrelevant, however, since the plaintiffs are in either case without standing or authority to force an action to reform the deed to the Barfields' predecessors.

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The plaintiffs' argument regarding Starmount's duty and liability under paragraphs 4 and 6 of the restrictive covenants in the deed is equally without merit. In order for the defendant Starmount Company to be liable, a legal duty must be present requiring them to police and enforce provisions in all deeds for the benefit of all landowners in the subdivision. This legal duty must arise expressly by deed or impliedly by law.

[3] The law of third-party beneficiary as it relates to that of restrictive covenants is designed to provide a remedy to the various grantees of a subdividing grantor *inter se*. "[W]here land within a given area is developed in accordance with a . . . uniform scheme of restriction, ordinarily any one purchasing in reliance on such restriction may sue and enforce the restriction against any other lot owner taking with record notice" *Craven County v. Trust Co.*, 237 N.C. 502, 513, 75 S.E. 2d 620, 628 (1953). This is so because the law treats each landowner as a promisor, promising to abide by the restrictions for the benefit of the third-party beneficiary landowners. The concepts of mutuality of covenant and consideration as well as mutual negative equitable easements have been applied to give landowners the right to sue *inter se*. *Maples v. Horton*, 239 N.C. 394, 80 S.E. 2d 38 (1953).

Restrictive covenants are really servitudes imposed on the land and as such are treated as easements appurtenant. Consequently, a landowner's cause of action arises out of the easement or use restriction appending to the land of another as a result of his promise in a covenant. See *Craven County*, *supra*. This provides no remedy against a subdivider unless he has expressly or impliedly undertaken responsibility for the enforcement of the various covenants.

The North Carolina cases cited by the appellants in their brief involve cases of express covenants to impose uniform restrictions and are not applicable to the facts as alleged here.

[4, 5] The only other remedy available to the plaintiffs is a covenant to enforce the restrictive covenants arising by implication. Restrictions in derogation of the free and unfettered use of land are strictly construed in favor of the unrestricted use of property. *Craven County*, *supra*. Such an implied covenant must arise from the words used and is based on the presumed intention of the parties. It is not favored by the law. 21 C.J.S., Covenants, § 9, p. 888 (1940). Under the facts as alleged by

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the appellant, there is no basis to infer from the language of paragraph 4 of the restrictive covenants in the deed to the Barfields' predecessors in title that the defendant Starmount Company intended to covenant that it would protect the interests of the plaintiff. On the contrary, paragraph 4 appears to be a covenant intended for the sole benefit of the defendant Starmount Company.

"A complaint may be dismissed on motion filed under Rule 12(b) (6) if it is clearly without merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or absence of facts sufficient to make a good claim. . . ." *Hodges v. Wellons*, 9 N.C. App. 152, 157, 175 S.E. 2d 690, 693 (1970). Under the facts as the plaintiffs allege them, there is no factual basis by which the plaintiffs have established a duty running to them from the Starmount Company, nor is there such a duty imposed at law. Therefore, the judgment below is affirmed dismissing the complaint as to the defendant Starmount Company.

Affirmed.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. HENRY CLIFFORD BYRD, SR.

No. 7418SC630

(Filed 18 September 1974)

1. Criminal Law § 145.1— revocation of probation — changing residence without permission — consideration of additional grounds

Defendant's probation was properly revoked on the ground that defendant changed his place of residence without advising his probation officer, and it was unnecessary for the appellate court to determine whether the evidence supported revocation on the additional ground that defendant wilfully failed to make restitution payments ordered by the court.

2. Criminal Law §§ 140, 145.1— probation revocation — authority to order consecutive sentence

A judge activating a probationary sentence has no authority to cause such sentence to run consecutively to a sentence imposed on defendant after the trial at which the probationary sentence was imposed.

State v. Byrd

APPEAL by defendant, Henry Clifford Byrd, Sr., from *Long, Judge*, 25 March 1974 Session of Superior Court held in GUILFORD County. Before the Court of Appeals on 27 August 1974, counsel submitted the case on briefs pursuant to North Carolina Court of Appeals Rule 10.

In separate indictments in April and May 1973, defendant was charged respectively with felonious assault with a deadly weapon with intent to kill inflicting serious bodily injury and with felonious possession of a handgun (the defendant having been previously convicted of forgery in Virginia). On June 8, 1973, the jury, in the trial of the felonious assault charge, found the defendant guilty, after which the defendant was sentenced to five (5) years in the State's prison. The execution of the sentence was suspended subject to certain terms and conditions which were incorporated in Probation Judgment No. 73CR22434 (filed June 26, 1973). On July 18, 1973, the defendant, on proper waiver of counsel, pleaded guilty in open court to felonious possession of a handgun which arose out of the same transaction as the felonious assault charge. Judgment was entered thereafter sentencing the defendant to six (6) months in county jail. This judgment was suspended on certain terms and conditions by Judgment No. 73CR19744 (filed July 18, 1973).

On December 19, 1973, a probation warrant and order for a *capias*, No. 73CR22434, was issued upon information contained in a report by Glenwood Wilson, a duly authorized probation officer, that the defendant had violated the terms and conditions of his probation in the assault case, to wit:

- (1) that the defendant, on or about November 1, 1973, after having accepted probation and supervision, changed his place of residence without advising his probation officer;
- (2) that the defendant changed jobs without the written consent of his probation officer; and,
- (3) that the defendant has failed to pay into the office of the Clerk any of the required \$30 weekly installments on \$2,000, which was to be applied *pro rata* on hospital and doctor bills.

On December 18, 1973, a probation warrant and order for a *capias*, No. 73CR19744, was issued upon information contained in another report by Officer Wilson that the defendant had

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violated the conditions of his probation in the felonious possession case by his failure to advise Wilson of a change in residence and by his failure to pay court costs of \$109 within sixty (60) days of judgment as required by the probation judgment of July 18. On 26 February 1974, the defendant's probation officer served two bills of particulars on defendant pursuant to G.S. 15-200.1 advising him that the officer intended to submit to the Judge of the Superior Court at the 18 February 1974 Session his report of alleged probation violations which, if found true, would constitute authority to said judge to put the suspended sentences into effect. At the call of these cases, the defendant, in open court and represented by counsel, admitted and stipulated that he had left his place of residence without the permission of his probation officer and that he was \$740 behind in payments.

At the conclusion of the above hearing, Judge Long found that the defendant changed residence and jobs without the consent of his probation officer, that the defendant being able-bodied and working part-time wilfully failed to make any weekly restitutionary payments, and that he likewise failed to pay court costs. Judge Long thereupon, in his discretion, revoked the probation in each case and ordered the prison sentence into immediate effect.

Defendant appealed to the Court of Appeals.

Attorney General Robert Morgan by Associate Attorney John R. Morgan, for the State.

Assistant Public Defender Dallas C. Clark, Jr., for defendant appellant.

CAMPBELL, Judge.

The defendant contends that the trial court erred in finding that the defendant wilfully failed to pay into court the monies ordered under the probationary judgments imposed in both cases and that the court erred in ordering revocation of defendant's probationary sentences. By way of a motion filed 21 August 1974 with the Court of Appeals, the defendant argues that the judgment of Judge Long in the probation revocation hearing should be arrested in that it sought to impose execution of the suspended sentences at the end "of any prison sentence now being served by the defendant." Between the time of the original

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judgments suspending sentence and the judgment putting the sentences into effect the defendant had been convicted of larceny.

[1] The first contention of the defendant-appellant is directed toward the finding by Judge Long "that between July 18, 1973, and September 17, 1973, the defendant was able-bodied and worked part-time but wilfully failed to pay restitutionary installments as ordered by the court." Discussion of this assignment of error is unnecessary. The defendant admitted in open court that he had changed residences without the written consent of his probation officer in clear violation of his probation. In fact, the verified report of Officer Wilson discloses that he was completely unaware of the defendant's whereabouts for almost four months.

Under G.S. 15-199 (3) and (6), the legislature has empowered the court to impose conditions of probation requiring the probationer to report to the probation officer as directed and remain within a specified area. There can be little doubt that the residency and reporting requirements were valid.

Furthermore, "[p]robation or suspension of sentence comes as an act of grace to one convicted of . . . a crime." *State v. Duncan*, 270 N.C. 241, 245, citing *Escoe v. Zerbst*, 295 U.S. 490, 79 L.Ed. 1566 (1934). All that is required is that there be enough evidence to reasonably satisfy the judge in his sound discretion that the defendant has violated a valid condition of probation. It is well established that "[t]he breach of any single valid condition upon which sentence was suspended will support an order activating the sentence." *State v. Braswell*, 283 N.C. 332, 337, 196 S.E. 2d 185 (1973), citing *State v. Seagraves*, 266 N.C. 112, 145 S.E. 2d 327 (1965). There was no abuse of discretion here.

[2] The propriety of the defendant-appellant's motion in arrest of judgment filed just six days before oral argument is based on the presence of some fatal error on the face of the record proper. *State v. McClain*, 282 N.C. 357, 193 S.E. 2d 108 (1972). The defendant contends that a fatal error appears in the judgment which is part of the record proper, so the real problem involves the question of fatal error. That question can only be answered by looking to the authority of the judge in the probation revocation hearing, specifically, whether he can execute a sentence suspended in a prior trial and have it run consecutively with another sentence imposed in a subsequent trial.

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In the present case, Judge Long sought to execute the sentence at the prior trial by having it run consecutively with a sentence imposed at a subsequent trial. This he could not do. *State v. Fields*, 11 N.C. App. 708, 182 S.E. 2d 213 (1971). It is therefore ordered that judgment of probation revocation No. 73CR22434 be modified to provide that the sentence begin to run immediately.

Affirmed as modified.

Judges PARKER and VAUGHN concur.

SARAH C. HAIDUVEN v. FLOYD W. COOPER

No. 7420DC595

(Filed 18 September 1974)

1. Rules of Civil Procedure § 60— motion to set aside judgment denied — appeal

An appeal from an order denying a motion made pursuant to Rule 60(b) to set a judgment aside does not bring up for review the judgment from which relief is sought.

2. Rules of Civil Procedure § 60— motion to set aside judgment — requirements for granting

In order to grant a motion under Rule 60(b) (1) to relieve a party from a final judgment on the ground of mistake, inadvertence, surprise or excusable neglect, the court must find both that defendant's neglect was excusable and that he had a meritorious defense.

3. Rules of Civil Procedure §§ 52, 60— motion to set aside judgment — necessity for finding facts

Absent a request the trial judge is not required to find the facts upon which he based his ruling denying defendant's motion to set aside the judgment, and, in such case, it will be presumed that the judge, upon proper evidence, found facts sufficient to support his judgment.

4. Rules of Civil Procedure § 60— motion to set aside judgment — affidavits not considered

Although the appellate court may inspect the pleadings to see if a meritorious defense is alleged, when passing on the trial court's ruling on a motion to set aside the verdict the court does not consider affidavits for the purpose of finding facts itself on the issue of excusable neglect.

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APPEAL from *Crutchfield*, District Judge, 18 March 1974 Session of District Court held in MOORE County.

This is an appeal from an order denying defendant's motion under Rule 60(b) (1) of the Rules of Civil Procedure to set aside a judgment against him on the grounds of mistake, inadvertence, surprise, or excusable neglect.

Plaintiff, formerly the wife of defendant, brought this action to recover support payments for herself and her minor child allegedly due under a separation agreement signed by defendant. Defendant admitted execution of the agreement and his failure to make payments as provided therein, but alleged as a defense that after execution of the agreement plaintiff had divorced him and married a man named Haiduven, who had thereafter supported plaintiff and the child, and that this relieved defendant of any obligation to do so. Defendant also alleged as a defense that plaintiff had breached the agreement by taking the child to live outside of the United States, thereby depriving defendant of his reasonable visitation rights under the separation agreement. In a counterclaim defendant sought custody of the child.

Neither party demanded jury trial, and on 21 August 1973 the case was heard by the district judge sitting without a jury. Plaintiff, represented by counsel, was present and presented evidence. Neither defendant nor his counsel was present. The court entered judgment, dated 21 August 1973 but filed 10 September 1973, making findings of fact and conclusions of law in favor of plaintiff, and, among other relief, awarding plaintiff judgment for the amount of the past due support payments due under the separation agreement for support of plaintiff and the child.

On 13 September 1973 defendant moved pursuant to G.S. 1A-1, Rule 60(b) (1) to set the judgment aside, stating as grounds for this motion that his counsel was on vacation in Europe from 3 August until 27 August 1973 and that prior to his counsel's departure neither defendant nor his counsel had received any notice of the calendaring of this case for trial.

After a hearing, the district judge entered an order dated 18 March 1974 denying the motion, and from this order defendant appealed, being represented on this appeal by new counsel of record and not by the attorney who had represented him during the earlier stages of this litigation.

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Dillard M. Powell for plaintiff appellee.

Johnson, Poole & Crockett by Samuel H. Poole for defendant appellant.

PARKER, Judge.

[1] The judgment filed against defendant on 10 September 1973 is not before us for review. No appeal was taken from that judgment, and "an appeal from an order denying relief under Rule 60(b) does not bring up for review the judgment from which relief is sought." 7 Moore's Federal Practice, § 60.30[1]. Thus, the only question presented by this appeal is the validity of the court's ruling made in the order appealed from, dated 18 March 1974, which denied defendant's motion for relief under Rule 60(b) (1).

[2, 3] In order to grant a motion under Rule 60(b) (1) to relieve a party from a final judgment on the ground of mistake, inadvertence, surprise, or excusable neglect, the court must find both that defendant's neglect was excusable and that he had a meritorious defense. *Hanford v. McSwain*, 230 N.C. 229, 53 S.E. 2d 84 (1949). In the present case the judge did not find the facts upon which he based his ruling denying defendant's motion. Had he been requested to do so, it would have been error for the judge not to have found the facts, *Sprinkle v. Sprinkle*, 241 N.C. 713, 86 S.E. 2d 422 (1955), but absent a request he was not required to do so. G.S. 1A-1, Rule 52(a) (2). In such case, it will be presumed that the judge, upon proper evidence, found facts sufficient to support his judgment. *Holcomb v. Holcomb*, 192 N.C. 504, 135 S.E. 287 (1926).

[4] The record before us does not show any request that the judge made findings of fact, and counsel for defendant stated on oral argument that no such request was made. Although the appellate court may inspect the pleadings to see if a meritorious defense is alleged, *Sutherland v. McLean*, 199 N.C. 345, 154 S.E. 662 (1930), when passing on the trial court's ruling on a motion of this sort we do not consider affidavits for the purpose of finding facts ourselves on the issue of excusable neglect. *Holcomb v. Holcomb*, *supra*.

The cases cited above were decided under former G.S. 1-220, which has now been replaced by G.S. 1A-1, Rule 60(b) (1), but the principles announced still apply. *Doxol Gas v. Barefoot*, 10

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N.C. App. 703, 179 S.E. 2d 890 (1971). Appellant, who had the burden of showing error, has failed to do so.

Affirmed.

Judges CAMPBELL and VAUGHN concur.

EULA S. BOWES v. MELLIE LEWIS BOWES

No. 7417DC581

(Filed 18 September 1974)

Divorce and Alimony § 17— alimony — earning capacity — bad faith effort — earnings of wife

Award of alimony to the wife must be set aside where it was based on the husband's capacity to earn rather than his actual earnings and there was no evidence in the record supporting a finding that the husband is failing to exercise his capacity to earn because of disregard of his marital obligation, and where the earnings of the wife were not considered by the court.

APPEAL by defendant from *Clark, District Judge*, 28 January 1974 Session of District Court held in ROCKINGHAM County. Heard in Court of Appeals 28 August 1974.

Plaintiff seeks divorce from bed and board, permanent alimony, alimony pendente lite, custody of a minor daughter, child support and attorneys' fees.

The admitted facts are that the plaintiff and the defendant were married on 3 August 1940, and that three children were born of the marriage; two of the children are of age and emancipated with the remaining one, a minor daughter, nearly sixteen years of age; that the plaintiff is a fit and proper person to have custody and control of said daughter; that on or about 29 March 1971, the defendant gathered up his personal effects and moved out thereafter intending permanently to maintain a separate residence; that the defendant was the supporting spouse, capable of providing reasonable support for his wife and minor child.

The evidence in this case, for purposes of the appeal, will be directed to the issues of the earning capacity of the defendant and the support requirements of the plaintiff. Evidence offered

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by the plaintiff tended to show that the income of the defendant from 1964 through 1970 varied from \$4,637.43 to \$16,086.12. In 1970, the defendant's income was shown to be \$6,775.14. In July, 1973, the corporation M. L. Bowes Construction Co., Inc., of which the defendant is the principal shareholder, loaned his son \$2,360.00 with no interest. The plaintiff testified that on 31 August 1973, the daughter went to live with the defendant and that the defendant and daughter went on two vacations, one to the beach for seven days, the other to Canada for four days. She also testified concerning a trip by the defendant to Las Vegas for a week with his old Army unit. There was also testimony that defendant had moved from a mobile home trailer into a new home increasing his expenses.

By her own testimony, the plaintiff admits that she makes ninety dollars (\$90.00) per month by renting certain parts of their home and earns an additional sixty dollars (\$60.00) to seventy dollars (\$70.00) per week after taxes as an alterations clerk. She indicated that her job there might be curtailed in the near future. She also testified to doing some part-time sewing. There was evidence that the defendant had made certain payments to the plaintiff during the litigation for alimony and child support, none of which exceeded seventy-five dollars (\$75.00) per week. The plaintiff offered an accounting of her reasonably necessary expenses amounting to \$558.37 per month excluding amounts for mortgage payments.

The defendant testified that his salary from the corporation was presently two hundred dollars (\$200.00) per week or \$148.83 after tax and that his reasonable monthly expenses were \$556.69 excluding mortgage payments. In rebuttal to the plaintiff's evidence on the vacations, the defendant testified that the beach trip was to a friend's house where the only expenses were food and gas and that the Canada trip was fully paid for by the Kiwanis Club. The Las Vegas trip was paid for by the defendant. The defendant further testified that the reason he moved to the new home was because the mobile home was a one-room trailer used as an office for his business and in which it was impossible to stay after his minor daughter came to live with him.

On the above evidence, an order for alimony was entered on 8 February 1974. The trial judge found that the defendant had earning capacity as a grading contractor which enabled him to earn in excess of \$14,500.00 per year and that since 1970, he

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had failed to exercise his reasonable capacity to earn because of disregard of his marital obligation. The defendant was ordered to make all monthly payments on the home of the former marriage, the exclusive possession of which was awarded to the wife, and four hundred dollars (\$400.00) alimony per month. The home payments are \$249.12 a month making a total of \$649.12 per month for the wife.

The defendant appealed.

Gwyn, Gwyn & Morgan by Julius J. Gwyn for plaintiff appellee.

O'Connor & Speckhard by Donald K. Speckhard, for defendant appellant.

CAMPBELL, Judge.

The defendant contends that there was insufficient evidence before the trial court to support the findings of fact and award of alimony contained in its order of 8 February 1974. This order was presumably based on the earning capacity of the defendant rather than his actual income and on the amount felt necessary to provide reasonable subsistence to the plaintiff. Upon a review of the record, however, there is no evidence relating to the defendant's income except that contained in income tax returns predating 1971 and that contained in testimony of the defendant at the trial.

It is settled in North Carolina that "[t]o base an award on capacity to earn rather than actual earnings, there should be a finding *based on evidence* that the husband is failing to exercise his capacity to earn because of disregard of his marital obligation to provide reasonable support" *Robinson v. Robinson*, 10 N.C. App. 463, 468, 179 S.E. 2d 144, 147 (1971) (emphasis added). "If the husband is honestly and in good faith engaged in a business to which he is properly adapted, and is making a good faith effort to earn a reasonable income, the award should be based on the amount which defendant is earning when the award is made." *Robinson v. Robinson, supra*, at 468. There is no evidence in the record supporting a finding that the defendant is making a bad faith effort to earn a reasonable income. Consequently, the award should be based on evidence of earnings at the time the award is made. There being no such evidence other than that in the defendant's testimony, the award is not supported by sufficient evidence.

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"Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." G.S. 50-16.5(a). "[T]he earnings and means of the wife are matters to be considered by the judge in determining the amount of alimony. G.S. 50-16." *Sayland v. Sayland*, 267 N.C. 378, 382, 148 S.E. 2d 218, 222 (1966), quoting *Bowling v. Bowling*, 252 N.C. 527, 533, 114 S.E. 2d 228, 232 (1960). From the record, the wife had apparent earnings of sixty dollars (\$60.00) to seventy dollars (\$70.00) per week after taxes at the time of the trial. G.S. 50-16.5(a) requires a determination of alimony to have regard to the earnings of both parties. This was not done in the instant case.

The evidence required by the statutes and the cases to support the particular findings of fact and award of alimony in this case were absent, and the judgment of the trial court must be vacated and the cause remanded for further proceedings in accordance with this opinion.

Vacated and remanded.

Judges PARKER and VAUGHN concur.

JAMES W. SHAW v. ELIZABETH B. WOLF, PETER H. WOLF AND
EDMUND I. ADAMS

No. 7423DC626

(Filed 18 September 1974)

1. Mortgages and Deeds of Trust § 24— foreclosure — special proceeding improper

A special proceeding in the superior court is not the proper proceeding for foreclosure of a mortgage or deed of trust.

2. Mortgages and Deeds of Trust §§ 19, 36— injunction of foreclosure sale — estoppel to raise defenses

Since a special proceeding in the superior court for the purpose of foreclosing a deed of trust was a nullity, plaintiffs who executed the deed of trust were under no duty to file an answer in that proceeding, and their failure to do so did not create any estoppel to raise defenses against the foreclosure plaintiffs sought to enjoin in this action.

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APPEAL by plaintiff from *Osborne, District Judge*, 23 January 1974 Session, District Court, ALLEGHANY County. Heard in Court of Appeals 6 September 1974.

Plaintiff instituted this action 31 December 1973, to restrain and enjoin the defendants from foreclosing under a deed of trust, lands described therein and located in Alleghany County. Plaintiff alleged that he and his wife had executed a deed of trust to Floyd Crouse securing an indebtedness of \$5,000.00 to Edna R. Jennings; that Edna R. Jennings is now deceased; that during the years from 1962 to 1968 the plaintiff had done work for Mrs. Jennings and proceeds for such work were to be applied on the indebtedness; that the defendant, Elizabeth B. Wolf, since the death of Mrs. Jennings, has become the owner of the note secured by the deed of trust and has appointed Edmund I. Adams as substitute trustee in the deed of trust and has attempted to foreclose the deed of trust; that the plaintiff should be credited on the indebtedness for the work he had done for Mrs. Jennings during her lifetime in the amount of \$4,999.00; that the defendants have refused to discuss the matter with him and have proceeded with an attempt to sell the property; that an erroneous report of the foreclosure sale in the amount of \$6,000.00 was reported to the clerk of superior court; that any confirmation of the sale would cause the plaintiff to suffer irreparable damage.

Ralph Davis, Chief District Court Judge for the Twenty-Third Judicial District, on 31 December 1973, issued a temporary restraining order restraining and enjoining the defendants from foreclosing the property and further ordered the defendants to show cause why the restraining order should not be made permanent.

The defendants filed an answer to the effect that all matters alleged in the complaint have previously been adjudicated in a special proceeding entitled "*Elizabeth B. Wolf and Peter H. Wolf, Petitioners v. James Shaw and Olene Shaw, Respondents*"; that said special proceeding was instituted 31 August 1972 and is still pending; that James Shaw entered an appearance in the special proceeding but failed to file any answer or otherwise defend and a judgment and order of sale had been entered and a foreclosure sale ordered; that the plaintiff Shaw had participated in the judicial sales and had caused upset bids to be filed each time a sale was made until the clerk of court ordered upset bidders to post bonds and that when this was done, this action

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was brought; that all matters raised in this proceeding are *res judicata* and that the plaintiff is estopped from raising said matters in this action.

This cause was heard at the 23 January 1974 Session of the Alleghany District Court. After considering the pleadings, orders and other contents of the special proceeding entitled "*Elizabeth B. Shaw, et al v. James Shaw, et al*" presently pending before the Clerk of Superior Court of Alleghany County and after hearing arguments of counsel, the court concluded that the plaintiff Shaw "[b]y his failure to answer or otherwise respond to the pleadings filed and served on him in said Special Proceeding . . . has waived any defenses against the foreclosure he seeks to enjoin in this action, and he is thereby estopped to bring this action." The court further adjudicated that the matters and things alleged in the complaint in this action do not constitute a legal defense to the foreclosure proceeding sought to be enjoined, inasmuch as any claim of payment of the debt secured by the deed of trust should have been asserted against the estate of Edna Jennings. The court thereupon dismissed the action and dissolved the restraining order theretofore entered but continued the restraining order pending this appeal.

From this adjudication, the plaintiff appealed.

Arnold L. Young for plaintiff appellant.

Edmund I. Adams for defendant appellees.

CAMPBELL, Judge.

It is obvious that the district court judge based his decision upon the failure of the plaintiff Shaw to answer or otherwise plead in the special proceeding which was pending before the Clerk of Superior Court of Alleghany County and such failure on his part constituted a waiver of any defenses he had to the foreclosure proceedings. This necessitates an inquiry into the special proceeding.

As was stated in *Wadsworth v. Wadsworth*, 260 N.C. 702, 706, 133 S.E. 2d 681, 685 (1963):

"There are certain absolute prerequisites of a valid judicial sale. ' . . . [I]t is necessary, in order that a judicial sale may be validly made, that the court by which it was ordered shall have the general power to decree a sale, and

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that in a particular case the jurisdiction of the court over the subject matter and parties shall have been acquired in a proper manner.' . . . "

[1] It is without question that the clerk of superior court has general jurisdiction of special proceedings. *Wadsworth v. Wadsworth*, *supra*. The question, however, still remains as to whether a special proceeding is proper for the foreclosure of a mortgage or deed of trust. The answer to this is in the negative. "A proceeding to foreclose a mortgage under an order of court is a civil action." 1 McIntosh, N. C. Practice, 2d Ed., § 239 (4). A foreclosure proceeding is an equity proceeding, and the clerk of superior court does not have any general equity jurisdiction. 1 McIntosh, N. C. Practice, 2d Ed., § 193, 2 McIntosh, N. C. Practice, 2d Ed., § 1695 (3).

[2] In the instant case, the petitioners, in the special proceeding which was and is pending, were attempting to use a special proceeding in lieu of a civil action for the purpose of foreclosing a deed of trust. This was an improper remedy, and since the clerk of superior court had no jurisdiction, the proceeding was a nullity. The respondents Shaw in that proceeding were under no duty to file an answer, and their failure to do so did not create any estoppel.

It is noted that the various sales of the land in question were conducted "under and by virtue of an Order of the Clerk of Superior Court and of the Power of Sale contained in a certain Deed of Trust." Thus, while the order of the clerk of superior court was a nullity, the sales being conducted under the power of sale contained in the deed of trust were valid.

Since Shaw was not estopped, the judgment dismissing his action was erroneous.

Reversed.

Judges PARKER and VAUGHN concur.

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STATE OF NORTH CAROLINA v. CHESTER HARRIS

No. 7418SC609

(Filed 18 September 1974)

1. Homicide § 20— unauthenticated photograph — absence of prejudice

Defendant in a homicide prosecution was not prejudiced by testimony about an unauthenticated photograph shown a witness for the purpose of refreshing his recollection where the photograph did not serve that purpose and was not introduced in evidence or shown to the jury.

2. Criminal Law § 166— abandonment of assignments of error

Assignments of error not brought forward and argued in the brief are deemed abandoned. Court of Appeals Rule 28.

3. Homicide § 15— asking defendant's weight

Defendant in a homicide case was not prejudiced when the solicitor was permitted to ask him what he weighed.

4. Homicide § 24— instructions on presumptions of malice and unlawfulness

Trial court's instructions on the presumptions of unlawfulness and malice arising from the showing of a death caused by the intentional use of a deadly weapon were proper without an additional instruction that no such presumptions arise if the State's uncontradicted evidence shows the killing was in self-defense.

5. Homicide §§ 9, 28— self-defense — burden on defendant — validity

In a homicide prosecution, the placing of the burden on defendant to prove to the satisfaction of the jury that he acted in self-defense does not require defendant to prove his innocence and relieve the State of the burden of proving criminality.

6. Homicide § 30— erroneous submission of lesser offense

In a prosecution for second degree murder, error, if any, in the submission of an issue of the lesser included offense of involuntary manslaughter was favorable to defendant and he cannot complain thereof.

APPEAL by defendant from *Long, Judge*, 4 February 1974 Regular Criminal Session, Superior Court, GUILFORD County, Greensboro Division. Argued in the Court of Appeals 26 August 1974.

Defendant was charged with murder. Upon a probable cause hearing, he was bound over to Superior Court for trial for second degree murder, and the State proceeded on this charge upon defendant's plea of not guilty. He was found guilty

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by the jury of involuntary manslaughter; and appealed from the judgment entered on the verdict.

Facts necessary for decision are set out in the opinion.

Attorney General Carson, by Assistant Attorney General Ricks, for the State.

Ellis J. Harrington, Jr., Assistant Public Defender, for defendant appellant.

MORRIS, Judge.

[1] Defendant's first and second assignments of error are addressed to the court's allowing a State's witness to testify about State's Exhibit No. 12 as to which there was neither a proper foundation nor a proper authentication. Some of the exceptions upon which these assignments of error are based are not properly before us because it is impossible to determine from the record whether an objection was made at trial and a ruling made thereon by the court. Nevertheless, we discuss the assignments of error as though they were properly before us. The photograph in question was a photograph of the parking lot on which the homicide took place. It is true the witness was very vague in his identification by location of automobiles in the photograph shown him *to refresh his recollection*. It is also true, as defendant contends, that photographs when relevant and properly limited and authenticated are "competent to be used by a witness to explain or to illustrate anything it is competent for him to describe in words." *State v. Dawson*, 278 N.C. 351, 180 S.E. 2d 140 (1971). However, as defendant candidly concedes, defendant must show not only that the photograph *used to illustrate the witness's testimony* was unauthenticated, but that its erroneous use was prejudicial and that absent the error, a different result would be likely. *State v. Willis*, 20 N.C. App. 43, 200 S.E. 2d 408 (1973). The witness was handed the photograph in question for the purpose, as stated by the solicitor, of refreshing the witness's recollection. It obviously did not serve that purpose, and the photograph was never introduced into evidence and never shown to the jury. The witness did, however, draw on the blackboard a diagram of the parking lot and the location of the vehicles at the time of the shooting. We fail to perceive any prejudice to defendant even if we should concede error, which we do not do.

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[2] Assignments of error Nos. 3, 4, 5, 6, 7, 9, 10, and 11 are deemed abandoned by appellant since they are not brought forward and argued in his brief. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

[3] By his eighth assignment of error, defendant urges that prejudicial error was committed when the court allowed the solicitor to ask the defendant how much he weighed. We fail to see prejudicial error. This assignment of error is also overruled.

[4] Defendant's remaining assignments of error are to the charge of the court. He first contends that the court in charging the jury as follows committed reversible error:

"If the State proves beyond a reasonable doubt that the defendant intentionally killed Harold Farrington with a deadly weapon or intentionally inflicted a wound upon Harold Farrington with a deadly weapon which proximately caused his death, the law raises two presumptions: first, that the killing was unlawful, and, second, that it was done with malice. Then, nothing else appearing, the defendant would be guilty of second degree murder."

Defendant concedes that this portion of the charge is in accord with long-standing principles of law in this State. See *State v. Propst*, 274 N.C. 62, 161 S.E. 2d 560 (1968), and cases there cited. He urges, however, that the court should have further instructed the jury:

"If on the State's evidence there is uncontradicted evidence that the killing arose out of an act of self-defense, then no presumptions arise that the killing was unlawful and done with malice. Though the State is free to attempt to prove malice, it must do so unaided by presumptions."

We are not disposed to change the long-standing legal principles extant in the law of this jurisdiction with respect to death resulting from an intentional shooting. Indeed, even if defendant's position had merit, he can show no prejudice, because conviction of a lesser offense renders harmless any errors in the charge with respect to the more serious offense unless it can be shown that the verdict was affected by the error. *State v. McLamb*, 20 N.C. App. 164, 200 S.E. 2d 838 (1973), and cases there cited. Defendant has not shown that the verdict was affected by the alleged error. This assignment of error is without merit and is overruled.

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[5] By his assignment of error No. 12, defendant challenges the instruction of the court with respect to self-defense, conceding that the portion of the charge to which he excepts accurately reflects the current status of the law of this jurisdiction, to wit: the defendant has the burden of proving that he acted in self-defense to the satisfaction of the jury—not by the greater weight of the evidence nor beyond a reasonable doubt—but simply to the satisfaction of the jury. His contention is that our law has the effect of requiring defendant to prove his innocence and relieves the State of the burden of proving criminality. This contention was urged by the defendant in *State v. Kelly Dean Sparks*, 285 N.C. 631, 207 S.E. 2d 712 (1974), and there rejected. We also reject it.

[6] Finally, defendant urges that the court erroneously submitted to the jury an issue as to involuntary manslaughter. His argument that such an issue is not supported by the evidence is persuasive. Nonetheless, in *State v. Vestal*, 283 N.C. 249, 195 S.E. 2d 297 (1973), the Supreme Court, through Higgins, J., discussed this question at length. The result was to reaffirm the long-standing position of this jurisdiction that the defendant cannot complain of a verdict of guilty of a lesser degree of homicide. “‘An error on the side of mercy is not reversible.’” *State v. Vestal*, *supra*, citing *State v. Fowler*, 151 N.C. 731, 66 S.E. 567. Justice Higgins said:

“This proposition fails of its own weight. The defendant gains a new trial if the court fails to charge on a lesser offense of which there is evidence. The judge, therefore, must be alert to the danger of a new trial if he fails to charge on the lesser offense. In borderline cases, prudence dictates submission of the lesser offenses. To give the defendant absolution if the judge makes a mistake in his favor, would tend to put the judge on trial. Such is not the purpose of the law.” *State v. Vestal*, *supra*, at 253.

We conclude that defendant’s trial was free of prejudicial error.

No error.

Chief Judge BROCK and Judge MARTIN concur.

City of Greensboro v. Sparger

CITY OF GREENSBORO v. H. TATUM SPARGER AND WIFE, BETTY TOUCHSTONE SPARGER

No. 7418SC491

(Filed 18 September 1974)

Eminent Domain § 6— amount of compensation—damages from sewer overflow after taking

In an action to determine the amount of compensation for land condemned by a city for a sewer outfall line, the trial court erred in the admission on the question of damages of evidence concerning overflow of a manhole in the sewer line after its installation; any damages the landowners seek as a result of improper, unlawful or negligent construction of the sewer line after the taking must be sought in a separate action.

APPEAL by petitioner from *Lupton, Judge*, 12 November 1973 Session of Superior Court held in GUILFORD County. Heard in the Court of Appeals 26 August 1974.

This appeal is constituted of two proceedings in eminent domain which were instituted by petitioner under the authority of Section 6.101 et seq. of its Charter to acquire a right-of-way across properties of respondents for the purpose of installing and thereafter maintaining a sanitary sewer outfall line. From the adoption of final resolutions of condemnation by the Greensboro City Council approving the reports of the board of appraisers as to the amount of just compensation to which respondents were entitled for the two takings, respondents appealed to the Superior Court. There the two proceedings were consolidated for trial, and it was stipulated in the pretrial order that the only issue in controversy was: What amount of damages, if any, are the respondents, H. Tatum Sparger, and wife, Betty Touchstone Sparger, entitled to recover as just compensation for the taking of a right-of-way across their property?

Petitioner's motion for a directed verdict at the conclusion of all the evidence was denied and petitioner excepted. The jury answered the issue in the amount of \$13,288, a figure substantially higher than the appraiser's award. Petitioner's motions for a judgment notwithstanding the verdict and for a new trial were denied, and petitioner, in apt time, gave notice of appeal to this Court.

Additional facts necessary for decision are set out in the opinion.

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City Attorney Jesse L. Warren, by Deputy City Attorney Samuel M. Moore and Assistant City Attorney Dale Shepherd, for petitioner appellant.

Thomas Turner and J. Owen Lindley for respondent appellees.

MORRIS, Judge.

Petitioner first contends that the trial court committed prejudicial error in overruling petitioner's objections to respondents' questions concerning an alleged overflow of a manhole in the sewer line after its installation, permitting photographs of the overflow to be identified and admitted to illustrate the witness' testimony, and charging the jury with respect to the overflow. Petitioner's position is that any damage to respondents resulting from the overflow of a manhole is not cognizable.

During the course of the trial the respondent and his witnesses testified concerning an alleged overflow of a manhole in the sewer line as an element of damages in these proceedings. The overflow occurred 24 months after the taking in the first proceeding and 18 months after the taking in the second proceeding. Respondent did not offer any evidence as to whether this occurrence was in the nature of negligent installation or maintenance of the sewer line or any other theory. Petitioner objected to the testimony on the ground that this occurrence was not a direct and proximate result of the taking and was too remote in time from the dates of taking to be encompassed in these proceedings. Petitioner's position is well taken.

It is well settled in this State that where a portion of a tract of land is taken by a public authority in an eminent domain proceeding, the just compensation to which the landowner is entitled is the difference between the value of the property immediately before and immediately after the taking. *Barnes v. Highway Commission*, 250 N.C. 378, 109 S.E. 2d 219 (1959); *Highway Commission v. Black*, 239 N.C. 198, 79 S.E. 2d 778 (1954); *Light Co. v. Sloan*, 227 N.C. 151, 41 S.E. 2d 361 (1947). Compensation must be determined as of the time of the taking. *DeBruhl v. Highway Commission*, 247 N.C. 671, 102 S.E. 2d 229 (1958). Occurrences or events which may affect the value

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of the property after the date of the taking are not cognizable in an assessment of damages in an eminent domain proceeding:

“The fundamental principle that private property cannot be taken by eminent domain without just compensation requires that the fair market value of the property condemned shall be determined *as of the date of the taking, and unaffected by any subsequent change in the condition of the property.*” (Emphasis supplied.) *Highway Commission v. Black, supra*, and quoted with approval in *DeBruhl v. Highway Commission, supra*.

Additionally, only damages proximately and directly caused by the taking at the time of the taking are recoverable. Any damages which respondents seek as a result of improper, unlawful, or negligent construction of the sewer line *after* the taking, must be sought in a separate action:

“If the damage for which recovery is sought is the result of improper, unlawful, or negligent construction or maintenance, recovery may not be had therefor in the (eminent domain) proceeding. The owner is relegated in such a case to a common-law action for damages . . . Trespass upon the remainder is likewise not to be considered in the assessment of damage in a partial-taking case, and this is true whether the trespass is a matter of past history or future possibility.” Nichols on Eminent Domain, Consequential Damages, Vol. 4A, §§ 14.245[1] and 14.245[2].

We hold that it was reversible error to admit evidence of the sewer overflow in these proceedings. Respondents may proceed in a separate suit for trespass or nuisance damages for injuries sustained subsequent to the taking, but they cannot recover for such damages in this proceeding.

Since it cannot be determined whether the sewer overflow was a major consideration of the jury in assessing the damages awarded in this case, a new trial must be had.

Petitioner assigns other rulings of the court as error. We agree that the court erred in allowing evidence of the resubdivision of lots. However, since this and other errors assigned are not likely to occur at another trial, we do not discuss them.

New trial.

Chief Judge BROCK and Judge MARTIN concur.

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STATE OF NORTH CAROLINA v. HOYLE CLAXTON MEDLIN

No. 7420SC681

(Filed 18 September 1974)

Automobiles § 125; Criminal Law § 34— drunken driving — charge of second offense — trial for first offense — references to prior offense — continuance — mistrial

Where defendant was charged in the warrant with driving under the influence of intoxicating liquor, second offense, the reference to a prior offense when the warrant was read at the arraignment in the presence of prospective jurors prior to the solicitor's announcement that defendant would be tried only for a first offense was proper, and defendant was not prejudiced when, in the selection of the petit jury, the solicitor referred to the warrant and prior offense since the prospective jurors were already aware of the prior offense as set out in the warrant; therefore, the trial court did not abuse its discretion in the denial of defendant's motion for a mistrial and a continuance based on the references to the prior offense.

APPEAL by defendant from *Chess, Special Judge*, 11 February 1974 Session of Superior Court held in STANLY County.

Heard in the Court of Appeals 3 September 1974.

Defendant was convicted in District Court on a warrant charging a second offense of operating a motor vehicle on a public highway while under the influence of intoxicating liquor, a violation of G.S. 20-138. He appealed to Superior Court for a trial *de novo*.

Upon arraignment in the Superior Court, the District Attorney informed the court that the defendant was charged with a second violation of G.S. 20-138 but announced that the State would not ask for a verdict of guilty of driving under the influence, second offense. The defendant was placed on trial for a first offense of driving while under the influence of intoxicating liquor. During the selection of the jury, reference was made by the District Attorney to the prior charge against the defendant, and the warrant was read to prospective jurors. Defendant moved for a mistrial and a continuance. This motion was denied.

The State's evidence tended to show that defendant was driving his truck on the public highway weaving to the left of the center line; that he was staggering and unsteady on his feet when he got out of his vehicle; that there was a strong odor of

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alcohol on his breath; his talk was very slurred; and that, in the opinion of the arresting officer, he was under the influence of intoxicating liquor.

Defendant offered no evidence.

The jury returned a verdict of guilty. From judgment imposed thereon, defendant appealed.

Attorney General James H. Carson, Jr., by Assistant Attorney General William B. Ray and Assistant Attorney General William W. Melvin, for the State.

Gerald R. Chandler for defendant appellant.

BALEY, Judge.

The defendant assigns as error the failure of the court to grant his motion for a mistrial and a continuance. He asserts that the reference to the prior offense of defendant as set out in the warrant which charged him with driving under the influence of intoxicating liquor, second offense, was prejudicial.

Upon arraignment the charge in the warrant of driving under the influence of intoxicating liquor, second offense, was read to defendant in the presence of prospective jurors. This reference to a prior offense as an essential element of that charge was entirely proper. The defendant did not object or move for mistrial at this time. The District Attorney then elected to try defendant only for a first offense. This election was obviously for the benefit of the defendant. Then, in the selection of the petit jury, reference was made to the warrant and the prior offense and upon this occasion defendant made a motion for mistrial and a continuance of the case.

At the time of jury selection it is clear that the prospective members of the jury were already aware of the prior offense of the defendant as set out in the warrant. The additional comment of the District Attorney while not approved did not add any information to that already made public in the arraignment. Whether there was sufficient prejudice to defendant to justify ordering a mistrial and continuance was a matter within the discretion of the trial judge. He was in the best position to make this determination. In the absence of abuse of such discretion—which does not here appear—the action of the trial court in denying the motion for a mistrial and continuance will not be

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disturbed. *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481; *State v. Cox*, 281 N.C. 275, 188 S.E. 2d 356; *State v. Baldwin*, 276 N.C. 690, 174 S.E. 2d 526.

Defendant was tried for a first offense of driving intoxicated. The evidence submitted and the charge of the court related solely to the elements of a first offense. The State's evidence was strong and convincing. Defendant has shown no error sufficiently prejudicial to warrant a new trial.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. OTIS LEE GREEN

No. 7418SC599

(Filed 18 September 1974)

1. Criminal Law § 98— sequestration of witnesses — discretionary matter

The decision to sequester witnesses rests in the discretion of the trial judge and is not reviewable in the absence of showing of an abuse of discretion.

2. Arrest and Bail § 3— arrest without warrant — permissible circumstances

A peace officer may arrest without a warrant when he has reasonable ground to believe that the person to be arrested has committed a felony or a misdemeanor in his presence or when he has reasonable ground to believe that the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody. G.S. 15-41.

3. Arrest and Bail § 3— arrest without warrant — felony committed in officers' presence — evasion of arrest

Officers had reasonable ground to believe that defendant and his companions were committing the felony of possession of heroin in the presence of the officers and had reasonable ground to believe that the subjects had committed a felony and would evade arrest by disposing of the heroin if not immediately taken into custody where officers were told by an informant, who had given reliable information in the past, that defendant and two others were at a named location in possession of a large quantity of heroin which they were preparing for street sale, the officers went to the vicinity where they found a car belonging to the wife of one of defendant's companions, the car was parked in front of a residence where defendant could likely be

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found, one of the officers went to procure a warrant at that time, and defendant and his companions emerged from the residence and started to drive away.

APPEAL by defendant from *Long, Judge*, 4 February 1974 Session of Superior Court held in GUILFORD County. Heard in the Court of Appeals 26 August 1974.

Defendant was charged in a bill of indictment, proper in form, with possession of a controlled substance, heroin.

The State's evidence tended to show the following: On 10 September 1973, Greensboro Police Officers Daughtry and McMillan were on duty as a team with the Narcotics Division of the Greensboro Police Department. At approximately 8:00 p.m. they received a telephone call from an informant who stated that Otis Lee Green (defendant), Stanley Gray Smith and George Phillip Arrington had just returned from Durham, North Carolina, with a large quantity of heroin; that just prior to calling the officers, the informant had personally seen the three at the address of 605 Watson Street, Greensboro, North Carolina, where they were cutting the heroin and packaging it for street sale. Officers Daughtry and McMillan immediately drove to 605 Watson Street and established surveillance of the residence at that address by 8:20 p.m. The two officers knew Stanley Gray Smith; knew that Smith married the granddaughter of Mrs. Marie Cobb; and knew that Mrs. Marie Cobb lived at 605 Watson Street. The officers observed a white 1973 Grand Prix Pontiac with license plate CSD-384 parked at 605 Watson Street. They had previously checked the registration on this white Pontiac and knew that it was registered in the name of Jeanette Arrington, the wife of George Phillip Arrington. After making these observations, the officers, by police radio, requested assistance. Detective Tolbert came to the scene, and Patrolmen Henline and Smith also came to the scene. Officer McMillan was dispatched to secure a search warrant for the premises at 605 Watson Street. Detective Tolbert and Officer Daughtry stationed their vehicle at one end of the block on Watson Street, while Patrolmen Henline and Smith stationed their vehicle at the other end of the block. At approximately 9:10 p.m. Officer Daughtry observed Otis Lee Green (defendant), Stanley Gray Smith and George Phillip Arrington leave the house (605 Watson Street) and get into the white 1973 Grand Prix Pontiac. Arrington got in the driver's seat; Smith got in the passenger seat in the right front; and Green (defend-

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ant) got in the right rear passenger seat. Officer Daughtry notified Patrolmen Henline and Smith, by police radio, that the Pontiac was leaving and that Officers Daughtry and Tolbert were going to stop it. As the white Pontiac approached Officers Daughtry and Tolbert, Tolbert drove his vehicle into the intersection and blocked Watson Street. As Officer Daughtry got out of the police vehicle and walked toward the white Pontiac, it began backing along Watson Street. Patrolmen Henline and Smith then blocked the street to the rear of the Pontiac with their police cruiser. Officer Daughtry approached the white Pontiac and advised the occupants that he had reasonable grounds to believe they had narcotic drugs in the vehicle and on their persons. The four officers then approached the white Pontiac, placed the occupants under arrest and removed them from the vehicle one by one. As the occupants of the front seat were getting out, Defendant Green, who was sitting in the back seat, dropped two cigarette packages out the window. One of the cigarette packages was a Winston cigarette package containing forty-five bags of white powder, which was later analyzed as heroin. The officers searched Defendant Green and found on his person four needles, a syringe, and a metal bottle cap which contained a residue of heroin.

Defendant offered evidence which tended to show that he had no narcotics in the car; that he did not drop narcotics out of the car; and that he did not have needles, a syringe, or a bottle cap on his person.

The jury found defendant guilty as charged.

Attorney General Carson, by Deputy Attorney General Vanore, for the State.

Eighteenth District Assistant Public Defender Dowda, for the defendant.

BROCK, Chief Judge.

[1] Defendant assigns as error the refusal of the trial judge to grant his motion to sequester the State's witnesses. It has long been the rule in this jurisdiction that the decision to sequester witnesses rests in the discretion of the trial judge and is not reviewable in the absence of showing an abuse of discretion. *State v. Spencer*, 239 N.C. 604, 80 S.E. 2d 670. Defendant has failed to show an abuse of discretion, and we see none.

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Defendant assigns as error the denial of his motion to suppress the evidence. He argues that the arrest and search were unlawful because the arrest and search were effected without a warrant and that the officers did not have reasonable grounds for arrest without a warrant.

[2] A peace officer may arrest without a warrant when he has reasonable ground to believe that the person to be arrested has committed a felony or misdemeanor in his presence. Also a peace officer may arrest without a warrant when he has reasonable ground to believe that the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody. G.S. 15-41. In this case it seems that the arrest without a warrant was justified under either of the above theories.

[3] Officer Daughtry was told by an informant, who had given him reliable information in the past, that Green (defendant), Smith and Arrington had a large quantity of heroin at 605 Watson Street and, at that time, were preparing it for street sale. The officers went immediately to the vicinity of 605 Watson Street and there observed an automobile which they knew belonged to Arrington's wife. It was parked in front of a residence where Green could likely be found. Having verified the informant's description to this extent, one of the officers went to procure a search warrant. When the same three subjects described by the informant emerged from the residence at 605 Watson Street and started to drive away, the officers had reasonable ground to believe they were committing the felony of possession of heroin in the presence of the officers. The officers also had reasonable ground to believe the subjects had committed a felony and would evade arrest by disposing of the heroin if not immediately taken into custody. Defendant's motion to suppress was properly denied.

Defendant undertakes to group under one assignment of error all his exceptions to the rulings of the trial judge upon the admission and exclusion of evidence. Each of these presents different rules of evidence for consideration and is not properly grouped under one assignment of error. Nevertheless we have followed defendant's exceptions as best we can and conclude that his arguments are without merit.

Defendant's remaining assignments of error are to the instructions given to the jury by the trial judge. We have

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reviewed each of these and find them to be without merit. In our opinion, the case was submitted to the jury under applicable principles of law.

No error.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. FRANK ERVIN McMULLIN

No. 7421SC501

(Filed 18 September 1974)

1. Criminal Law § 66— in-court identification — pretrial photographic identification — prior acquaintance with defendant

In a homicide prosecution, a witness's in-court identification of defendant was based on the witness's acquaintance with defendant prior to the stabbing of deceased and was not tainted by a prior photographic identification at which only photographs of defendant and his brother were exhibited to the witness, where the witness knew defendant and his brother only by their first names prior to the crime, the witness saw defendant and his brother fighting with the victim and saw defendant stab the victim, the witness told police the first name of the person who did the stabbing, and the photographs were exhibited to the witness to verify that defendant was the person so named by the witness, notwithstanding it would have been better police practice to have shown the witness several photographs from which to select defendant's photograph.

2. Criminal Law § 162— necessity for motion to strike — prejudice cured by subsequent testimony

Defendant should have moved to strike the objectionable part of a witness's answer in which she stated she was scared of defendant; any prejudice to defendant by reason of the answer was cured when the witness thereafter testified on cross-examination that she had not testified at a previous trial because she was afraid of defendant.

3. Criminal Law § 169; Homicide § 20— admission of knife not connected with crime — harmless error

In a prosecution for second degree murder by stabbing the victim with a knife, the admission of a pocketknife taken from defendant at the time of his arrest twenty days after the offense which was not related to the crime, if erroneous, was not prejudicial to defendant in light of the State's overwhelming evidence of defendant's guilt.

APPEAL by defendant from *Wood, Judge*, 18 December 1973 Session of Superior Court held in FORSYTH County. Heard in the Court of Appeals 26 August 1974.

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Defendant was charged in a bill of indictment, proper in form, with the murder of Jessie Lee Fowler on 3 March 1973. Upon call of the case for trial, the district attorney announced that the State would not seek a verdict of guilty of murder in the first degree, but would seek a verdict of guilty of either murder in the second degree or manslaughter.

The State's evidence tended to show that at about 6:00 p.m., 3 March 1973, defendant and his brother, Willie McMullin, engaged in a fight with Jessie Lee Fowler on Ninth Street, near its intersection with Patterson Avenue, in the City of Winston-Salem; that defendant stabbed Fowler several times and that Fowler died as a result of knife wounds. The defendant offered no evidence.

The jury found defendant guilty of voluntary manslaughter.

Attorney General Carson, by Assistant Attorney General Davis, for the State.

Harrell Powell, Jr., and Edward L. Powell, for the defendant.

BROCK, Chief Judge.

[1] Defendant assigns as error the admission of the in-court identification of the defendant by the witness Michael Mitchell. Upon objection, a *voir dire* was conducted. The witness testified that he had known defendant prior to this occasion, having seen him around this same intersection about every other weekend. However, the witness knew defendant only by his first name, Frank; he knew defendant's brother only by his first name, Willie. He told the investigating officers that Frank did the cutting. Willie was arrested at the scene, but Frank ran. The police showed the witness two photographs, one of Frank McMullin and one of Willie McMullin. The witness pointed out the photograph of Frank McMullin as being the person he knew as Frank and the photograph of Willie McMullin as being the person he knew as Willie. Based upon this identification, a warrant was issued for the arrest of the defendant Frank McMullin. The witness identified Frank McMullin in court as the person he had previously known only by the name Frank, and identified him in court as the person who stabbed the deceased.

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The trial judge made findings of fact based upon competent evidence that the in-court identification was based upon the witness' acquaintance with Frank prior to and at the time of the stabbing. Thereafter he permitted the witness to identify defendant before the jury.

We concede that it would have been better police practice to have shown the witness several photographs from which to select the defendant's photograph; nevertheless it is clear that the in-court identification was not tainted or influenced in any way by the procedure followed by the police in this case. They were not trying to engage in a procedure to permit the witness to identify the person who committed the offense. The witness already knew the defendant, albeit he did not know defendant's last name. The police were merely trying to guard against the possibility of arresting the wrong Frank. In our opinion the trial judge was correct in admitting the in-court identification of defendant by the witness Michael Mitchell.

[2] During the presentation of the State's evidence, Mattie Ray Mitchell, the mother of the witness Michael Mitchell, testified. She was acquainted with defendant and his brother and knew both their first and last names. She saw defendant and his brother fighting with Jessie Lee Fowler at the time of the fatal stabbing. During her testimony she stated: "That is all the part of it I seen and I said, 'Lord, have mercy, there's Frank standing up there cutting that man,' and I'm scared of Frank." Defendant thereafter objected, and the objection was overruled. However, defendant did not move to strike what he considered to be the objectionable part of the witness' answer. When inadmissibility is not indicated by the question, but becomes apparent by some feature of the answer, the objection should be by way of motion to strike the objectionable part of the answer. Stansbury's North Carolina Evidence, Brandis Revision, § 27. In any event the cross-examination of the witness as to why she had not testified at a previous trial of this case brought out again that she was afraid of Frank and was afraid to testify.

[3] Lastly defendant assigns as error that the trial judge allowed the State to introduce into evidence a pocketknife taken from the defendant at the time of his arrest twenty days after the offense. There was no evidence which related the pocketknife to the stabbing of the deceased.

Assuming *arguendo* that it was error to admit the knife into evidence, it was nonprejudicial beyond a reasonable doubt.

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The eyewitness description of defendant's stabbing the deceased and the evidence of death as a result of the stab wounds is so overwhelming that the introduction of the knife could not have had any influence on the jury verdict.

In our opinion defendant had a fair trial, free from prejudicial error.

No error.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. EARL ANDREW FRANKLIN

No. 7421SC635

(Filed 18 September 1974)

1. Criminal Law § 90— motion for continuance denied — no prejudice

The trial court did not err in denying defendant's motion for a continuance made on the grounds that the jury panel was present in court when defendant changed his plea from guilty to not guilty and demanded a jury trial and when defendant voiced dissatisfaction with his court appointed counsel and requested new counsel or permission to employ his own attorney, since defendant allowed those matters to come before the jurors by his own acts and since the court worked to avoid prejudice by conducting a hearing with respect to defendant's dissatisfaction outside the presence of prospective jurors and by instructing the jury to disregard the proceedings at arraignment.

2. Criminal Law §§ 60, 169— fingerprint evidence — admission not prejudicial

Defendant was not prejudiced by admission of expert testimony concerning the presence of his fingerprints on a stolen automobile where defendant himself admitted that his fingerprints were on the car.

APPEAL by defendant from *McConnell, Judge*, 18 February 1974 Session of Superior Court held in FORSYTH County.

Defendant Earl Andrew Franklin was indicted for felonious larceny of an automobile.

At the arraignment, the defendant, pursuant to a plea bargaining arrangement, pled guilty to temporary larceny of a motor vehicle, in violation of G.S. 20-105, for which he had also been indicted. Later defendant changed his plea to not guilty

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and demanded a jury trial. In so doing, defendant stated that he understood the charges against him, and understood his right to plead not guilty and to request a jury trial.

This arraignment took place in the presence of prospective jurors. The Court instructed the potential jurors to disregard any of the proceedings at arraignment. Defendant then announced in open court that he would like another attorney and would like the case to be continued. At this point the Court, defendant, clerk, court reporter and attorneys retired to a room outside the presence of the prospective jurors for a brief hearing. Defendant's motion was denied.

The State presented the following evidence. On 2 October 1972, at 8:00 a.m., Roger Cope left his white 1963 Chevrolet Impala in a parking lot. It was unlocked and the keys were in the ignition. Approximately four hours later Cope returned to the lot and discovered that his automobile was missing. He reported this to the police the last Sunday in October.

On 29 October 1972, at about 9:00 a.m., Officer B. W. Rich was in a restaurant and recognized the defendant as a prison escapee. When defendant left the restaurant, Rich followed him. The defendant ran, and while chasing him, Rich observed a weapon on defendant's person. Rich placed defendant under arrest for carrying a concealed weapon.

An investigation revealed that defendant was traveling in the stolen white 1963 Chevrolet Impala. A search of defendant's person yielded keys which fit the ignition of the stolen automobile.

When the automobile was returned to Cope the speedometer registered an additional 2,000 miles.

John R. Davis, a criminal lab specialist, made a positive identification that the latent fingerprints taken from the vehicle were those of defendant.

While cross-examining Davis, defendant said that he would like to tell the jury "how my fingerprints came to be on the car." On the stand defendant added, "My fingerprints were on that car." Defendant further added, "The evidence against me is almost overwhelming in this case, but I would like to clarify some points to the jury." He then testified that his reason for being in the automobile was to help start it for another person.

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Defendant was found guilty and judgment imposing a prison term was entered.

Attorney General Robert Morgan by Archie W. Anders, Associate Attorney, for the State.

John J. Schramm, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant raises two points on appeal: (1) whether the Court erred in denying defendant's motion for continuance, and (2) whether the Court erred in permitting State's witness to testify regarding State's exhibits numbered five and six when said exhibits were not properly introduced into evidence.

[1] Defendant moved for a continuance on the grounds that the jury panel was present in court when defendant made his pleas at the arraignment; and, when defendant voiced dissatisfaction with his court-appointed counsel and requested new counsel or permission to employ his own attorney. Defendant contends the Court erred in denying this motion. We do not agree.

"A motion for continuance is ordinarily addressed to the sound discretion of the trial court, and its ruling thereon is not subject to review absent an abuse of discretion [citations]." *State v. Baldwin*, 276 N.C. 690, 697, 174 S.E. 2d 526, 531. "Whether a defendant bases his appeal upon an abuse of judicial discretion, or a denial of his constitutional rights, to entitle him to a new trial because his motion to continue was not allowed, he must show both error and prejudice." *State v. Fountain*, 14 N.C. App. 82, 84, 187 S.E. 2d 493, 494, as quoted in *State v. Moses*, 272 N.C. 509, 158 S.E. 2d 617.

Defendant, of his own volition, made his original plea of guilty. He also chose to change the plea in open court. Further, defendant voluntarily voiced his dissatisfaction with his attorney before the prospective jurors. The jurors could not avoid hearing what defendant said. A defendant cannot by his own acts allow matters to come before jurors and then allege error by the Court in an attempt to escape the effects of his own acts.

The Court worked to avoid prejudice and minimize the effects of defendant's action. For example, after defendant's expression of dissatisfaction, the Court conducted a hearing on

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the matter outside the presence of prospective jurors. In its instruction to jurors before accepting evidence, the Court instructed them to disregard the proceedings at arraignment and to base their verdict "solely upon the evidence as it comes from the witness stand and not anything which took place in the beginning of the Court's questioning of the defendant pertaining to his plea."

Our survey of the record reveals that the Court acted properly and defendant failed to show error and prejudice, or an abuse of discretion.

[2] As to the second point, the Court's permitting the testimony of a State's witness regarding exhibits numbered five and six, we also affirm the Court's ruling. The substance of this testimony was that defendant's fingerprints were found on the stolen automobile. Defendant readily admitted on at least two occasions that his fingerprints were on the car. One of these admissions came at the conclusion of his cross-examination of State's witness. In view of defendant's admission, there is no prejudice as a result of the admission of the evidence. A verdict or judgment is not to be set aside on the basis of mere error and no more. The ruling complained of must not only be erroneous. It must also be material and prejudicial, and prove that but for the error a different result likely would have ensued. *See State v. Paige*, 272 N.C. 417, 424, 158 S.E. 2d 522, 527. The burden to prove that a different result would have ensued is on appellant.

Careful consideration of defendant's assignments of error leads us to conclude that they are without merit.

No error.

Judges CAMPBELL and PARKER concur.

HATTIE MAE GENTRY v. ADAM A. HACKENBERG

No. 7417SC631

(Filed 18 September 1974)

Automobiles § 83— pedestrian crossing at place other than crosswalk—
contributory negligence

In an action by plaintiff pedestrian to recover damages for personal injury sustained when she was struck by defendant's vehicle,

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the trial court properly granted defendant's motion for directed verdict where the evidence tended to show that plaintiff observed defendant's approaching vehicle, but in disregard of it attempted to cross the road at a place other than a crosswalk.

APPEAL by plaintiff from *Rousseau, Judge*, 11 March 1974 Civil Session of Superior Court held in ROCKINGHAM County.

In this action plaintiff seeks to recover damages for personal injury allegedly caused by the negligent operation of an automobile by defendant.

In her complaint she alleged: On 24 March 1972, at about 10:35 a.m., while driving his automobile northerly on U.S. 220 at a point approximately 5.2 miles south of Madison, North Carolina, defendant negligently drove the same against plaintiff, severely injuring her. Defendant was negligent in that: He failed to keep a proper lookout; he failed to keep his vehicle under proper control; he drove at a speed greater than was reasonable and prudent under the circumstances then and there existing; he failed to sound his horn, or give any other appropriate signal; he failed to slow down when he saw, or should have seen, plaintiff-pedestrian on or near the highway as he approached her; he failed to yield the right-of-way to plaintiff.

In his answer, defendant denied that he was negligent and pleaded contributory negligence on the part of plaintiff in that she failed to yield the right-of-way to the defendant's vehicle which was proceeding on the roadway, failed to keep a lookout for vehicles on the highway and in other respects failed to exercise reasonable and ordinary care for her own safety, and placed herself in a position of danger when she knew or should have known that it was dangerous to do so.

At the close of plaintiff's evidence defendant's motion for directed verdict, first, on the ground that plaintiff had failed to offer any evidence of negligence on the part of defendant, and, secondly, that plaintiff's own evidence established that she was guilty of contributory negligence which proximately caused any injury that she received, was allowed. From judgment dismissing the action, plaintiff appeals.

Gwyn, Gwyn & Morgan, by Allen H. Gwyn, Jr., for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter, by Richmond G. Bernhardt, Jr., and Miles Foy for defendant appellee.

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BRITT, Judge.

We hold that the directed verdict was proper on the ground that the evidence established that plaintiff was contributorily negligent as a matter of law.

Plaintiff's evidence, considered in the light most favorable to her, tended to show: On 24 March 1972, she lived in a rural area on the east side of U. S. 220 and had a garden on the west side of the highway. She had lived in the immediate area for fifty-one years. The pavement of the highway in front of her home was 24 feet wide and the adjoining shoulders of the road were 10 or 12 feet wide. At that point, the highway was straight for a considerable distance in both directions, there being an unobstructed view to the south for some three-fourths mile.

On that morning—it being a fair day—plaintiff had been to her garden on the west side of the highway and was returning to her home on the other side of the road. In addition to her regular attire, she was wearing a bonnet and was carrying a bucket and a hoe. When she reached the west shoulder of the highway, she stopped and waited while three southbound cars passed. Seeing no other cars coming from the north, but seeing a car approaching from the south “at the bottom of the hill” (some 1000 feet away), she proceeded to walk across the paved portion of the highway. After she reached the east shoulder of the road, she was struck by defendant's automobile which was traveling north.

The parties stipulated that the maximum posted speed limit at the scene of the accident was 60 m.p.h. Plaintiff introduced portions of defendant's deposition which tended to show: When defendant first saw plaintiff she was in the middle of the southbound lane, walking east at a normal gait. Defendant applied his brakes and drove onto the east shoulder of the road to avoid striking plaintiff. At the time of the impact, all four wheels of defendant's car were on the east shoulder and plaintiff struck his left rear fender.

We think the disposition of this appeal is controlled by *Blake v. Mallard*, 262 N.C. 62, 136 S.E. 2d 214 (1964). In *Blake*, page 65, Justice Sharp, speaking for the court stated the following rule:

“The failure of a pedestrian crossing a roadway at a point other than a crosswalk to yield the right of way to

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a motor vehicle is not contributory negligence *per se*; it is only evidence of negligence. (citation omitted). However, the court will nonsuit a plaintiff-pedestrian on the ground of contributory negligence when all the evidence so clearly establishes his failure to yield the right of way as one of the proximate causes of his injuries that no other reasonable conclusion is possible. (citations omitted.)

“ . . . It was plaintiff's duty to look for approaching traffic before she attempted to cross the highway.”

See also *Gamble v. Sears*, 252 N.C. 706, 114 S.E. 2d 677 (1960).

In the case at bar, plaintiff observed defendant's approaching vehicle, but in disregard of it attempted to cross the road. There is no evidence of a marked cross-walk, therefore, plaintiff should have yielded the right-of-way to defendant's vehicle. Not doing so, plaintiff's negligence was a proximate cause of her injury and the trial court, therefore, properly granted the motion for directed verdict in favor of defendant.

Affirmed.

Judges HEDRICK and BALEY concur.

STATE OF NORTH CAROLINA v. COLLIS CECIL WILBORN

No. 7421SC690

(Filed 18 September 1974)

Criminal Law § 34— evidence of prior offense — admissibility to show state of mind

In a prosecution for discharge of a firearm into an automobile and assault with a deadly weapon inflicting serious injury, testimony by defendant's former wife that defendant had shot at her on an occasion three years previously was admissible to show defendant's *quo animo*, or state of mind, at the time of the subsequent offenses.

APPEAL by defendant from *McConnell, Judge*, 12 February 1974 Criminal Session of Superior Court held in FORSYTH County.

In bills of indictment proper in form, defendant was charged with the felonies of (1) discharging a firearm into an

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occupied automobile and (2) assaulting J. H. Southern with a deadly weapon, inflicting serious injury. Defendant was also charged in a warrant with the misdemeanor of assaulting Michael Culbreth by pointing a shotgun at him. The offenses were alleged to have occurred on 8 December 1973.

Evidence presented at the trial tended to show, in pertinent part, the following: Prior to 8 July 1973, defendant and Frances Wilborn were married to each other but on that date they were divorced. On Saturday, 8 December 1973, around 4:00 p.m., defendant went to Revco Drugs in Winston-Salem where Mrs. Wilborn was working. He told Mrs. Wilborn that he would be off from his work on the following Monday and Tuesday and would like for her to meet him some place and talk with him. Mrs. Wilborn refused. The manager of the store asked defendant to leave and, following an argument and the manager threatening to call police, defendant left. Around 8:30 or 9:00 that night, defendant, while riding in the front passenger seat of an automobile driven by his daughter on U. S. 421 west of Winston-Salem, fired a 20-gauge shotgun into a pickup truck in which Mrs. Wilborn was riding with J. H. Southern. Southern was wounded in his left arm and drove on to Forsyth Memorial Hospital in Winston-Salem where he alighted from his vehicle and ran into the emergency room. Defendant followed Southern to the hospital emergency entrance where he pointed his gun at Michael Culbreth and several other ambulance attendants who were attempting to get a patient into the hospital; defendant ordered them to put their hands up and bring Southern out of the hospital so that defendant could kill him.

A jury found defendant guilty as charged. The court entered judgments imposing prison sentences from which defendant appealed.

Attorney General Robert Morgan, by Associate Attorney C. Diederich Heidgerd, for the State.

W. Warren Sparrow for defendant appellant.

BRITT, Judge.

By his two assignments of error, defendant contends that the court erred (1) in permitting Mrs. Wilborn to testify about an incident involving defendant that occurred some three years before the offenses for which defendant was being tried, and

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(2) in referring to the prior incident in the charge to the jury. We find no merit in the assignments.

On direct examination, over defendant's objections, Mrs. Wilborn testified: In August of 1970, she was working at Revco Drugs in Winston-Salem. On a Saturday night in that month, after she got off from work and went to her car in the parking lot, defendant shot at her with a 20-gauge gun. The bullet did not strike her, but went through the dress she was wearing and into the rear end of her car. Mrs. Wilborn displayed the dress she was wearing at the time of the previous shooting and pointed out a hole made by the bullet. After the incident, defendant and Mrs. Wilborn continued to live together but thereafter separated and were divorced.

In *State v. Humphrey*, 283 N.C. 570, 572, 196 S.E. 2d 516, 518 (1973), we find:

"The general rule in North Carolina is that the State may not offer proof of another crime independent of and distinct from the crime for which defendant is being prosecuted even though the separate offense is of the same nature as the charged crime. *State v. Long*, 280 N.C. 633, 187 S.E. 2d 47; *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364; 1 Stansbury North Carolina Evidence § 91 (Brandis rev. 1973). However, such evidence is competent to show 'the *quo animo*, intent, design, guilty knowledge, or scienter, or to make out the *res gestae*, or to exhibit a chain of circumstances in respect of the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions.' *State v. Jenerett*, 281 N.C. 81, 187 S.E. 2d 735; *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241."

We hold that the challenged evidence was competent to show defendant's *quo animo*, or state of mind, at the time of the offenses involved here. It follows that the court did not err in referring to the prior incident in summarizing Mrs. Wilborn's testimony in the jury charge. The assignments of error are overruled.

No error.

Judges HEDRICK and BAILEY concur.

Boulware v. Boulware

GEORGIA L. BOULWARE v. BROOKS L. BOULWARE

No. 7421DC658

(Filed 18 September 1974)

1. Divorce and Alimony § 23— provision of shelter as child support

Child support is not restricted to monetary payments but may include the provision of shelter for the child; therefore, the trial court properly awarded the plaintiff, who was given custody of the minor children of the parties, exclusive possession of the homeplace until the youngest child reaches majority.

2. Divorce and Alimony § 22— child support case — award of counsel fees proper

Trial court did not err in awarding counsel fees in this child support case.

APPEAL by defendant from *Henderson, Judge*, 11 March 1974 Session of District Court held in FORSYTH County.

This is an action for absolute divorce on ground of one-year separation, and for custody of and support for the four minor children of the parties. In his answer, defendant admitted the allegations of the complaint relating to the divorce, number of children, his ability to support them, and their need of support from him. However, by further answers he alleged that he was providing adequate support for the children, that a court order was not necessary, and that he should not be required to pay any fees for plaintiff's counsel. He asked that the divorce be granted, that plaintiff be awarded custody of the children, but that her demand for child support and counsel fees be denied.

The cause was heard without a jury after which the court entered judgment making findings of fact and conclusions of law and granting plaintiff the relief which she prayed, including \$100 attorney fees for her counsel. Defendant appealed, assigning errors as hereinafter set out.

White and Crumpler, by Michael J. Lewis, for plaintiff appellee.

Carol L. Teeter for defendant appellant.

BRITT, Judge.

By his first assignment of error, defendant contends the court erred in failing to find sufficient facts to support the

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judgment. We have carefully reviewed the judgment and conclude that the court did find sufficient facts to support it. The assignment of error is overruled.

[1] By his second assignment of error, defendant contends the court erred in awarding plaintiff exclusive possession of the homeplace until the youngest child reaches her majority.

The court found as a fact that plaintiff and defendant owned the homeplace as tenants by the entirety and that plaintiff and the four children had been living there since the parties separated in October 1972. Defendant did not except to this finding. The substance of defendant's contention is that since the statutes, and particularly G.S. 50-13.4 et seq., do not specifically provide that the court may allocate real estate belonging to a parent for the use of minor children, the court has no authority to do so. We reject this contention.

While applicable statutes employ the term "support payments" in several instances, we do not believe the General Assembly intended to restrict child support to monetary payments. For example, in G.S. 50-13.4(b), it is provided that "... the judge may enter an order requiring (the father or mother) to provide for the support of the child ..." without any reference to *payments*. Certainly, shelter is a necessary component of a child's needs and in many instances it is more feasible for a parent to provide actual shelter as part of his child support obligations than it is for the parent to provide monetary payments to obtain shelter. A careful reading of G.S. 50-13.4(f) (2) indicates that the General Assembly contemplated instances in which the court would require "the transfer of real or personal property or an interest therein ... as a part of an order for payment of support for a minor child ..." and made provision to compel such transfer. The assignment of error is overruled.

[2] Finally, by his third assignment of error, defendant contends the court erred in awarding counsel fees for plaintiff's attorney. He argues that the court's authority for awarding counsel fees in child support cases is derived from G.S. 50-13.6; that under the statute before the court can award fees it must determine that the interested party has insufficient means to defray expenses of the action, and that the supporting parent had refused to provide adequate support. We find no merit in the assignment. The court made findings as required by the cited statute and, inasmuch as the testimony is not included in

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the record on appeal, it is presumed that the findings are supported by competent evidence. *Cobb v. Cobb*, 10 N.C. App. 739, 179 S.E. 2d 870 (1971). In further support of our holding that the court did not err in awarding counsel fees, see *Teague v. Teague*, 272 N.C. 134, 157 S.E. 2d 649 (1967), and *Andrews v. Andrews*, 12 N.C. App. 410, 183 S.E. 2d 843 (1971).

The judgment appealed from is

Affirmed.

Judges HEDRICK and BAILEY concur.

MRS. MATTIE WOODY TODD, ADMINISTRATRIX OF ALEX GRAY TODD,
DECEASED v. HARVEY ADAMS, M.D., AND RANDOLPH HOSPITAL,
INC., A NORTH CAROLINA CORPORATION

No. 7418SC634

(Filed 18 September 1974)

Death § 3; Torts § 7— wrongful death — release by widow not binding on estate

Since a widow has no right of action for the wrongful death of her husband, she cannot execute a release for such a claim which is binding on the deceased husband's estate prior to the time she is appointed the personal representative of the estate. G.S. 28-173.

APPEAL from *Long, Judge*, 11 March 1974 Session of Superior Court held in GUILFORD County. Heard in the Court of Appeals 28 August 1974.

This is a civil action instituted by plaintiff, as administratrix of the estate of Alex Gray Todd, deceased, against the defendants, based upon the alleged death of plaintiff's intestate, by reason of the alleged malpractice of the defendants. In their answer, the defendants denied the material allegations of the complaint and, in addition, by subsequent amendment to their answer entered a plea in bar against recovery by plaintiff, upon the ground that plaintiff had theretofore executed a release which precluded the maintenance of the instant action. The record discloses that Alex Gray Todd was survived by his wife and six children.

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After a hearing on the defendants' plea in bar, the trial court made findings of fact which are summarized as follows:

On 26 April 1970, Alex Gray Todd, plaintiff's intestate, sustained personal injuries in an automobile accident while riding as a passenger in an automobile owned by him and operated by Peggy Ann Perry. Alex Gray Todd died on 29 April 1970. On 8 April 1971, Mattie Woody Todd, Alex Gray Todd's wife, after negotiations with a representative of the insurance carrier which afforded liability insurance on decedent's automobile, executed and acknowledged a release which included the following:

"RELEASE IN FULL

FOR THE SOLE AND ONLY CONSIDERATION OF EIGHT THOUSAND & No/100 (Dollars) (\$8,000.00**) to me/us paid, receipt of which is hereby acknowledged, I/we hereby release and discharge ALEX G. TODD and PEGGY PERRY his or their successors and assigns, and all persons, firms or corporations who are or might be liable from all claims of any kind or character which I/we have or might have against him or them, and especially because of all damages, losses or injuries to person or property, or both, whether developed or undeveloped, known or unknown, resulting or to result from accident that occurred on or about April 26, 1970, at Asheboro, N. C. and I/we hereby acknowledge full settlement and satisfaction of all claims of whatsoever kind or character which I/we may have against him or them by reason of the above mentioned damages, losses or injuries."

On 21 April 1972, Mattie Woody Todd applied for and was granted letters of administration for the estate of Alex Gray Todd.

The present action for the wrongful death of Alex Gray Todd was instituted by Mattie Woody Todd as administratrix of his estate on 24 April 1972.

Based on its findings of fact, the trial court, among other things, concluded as a matter of law that:

"The grant[ing] of letters of administration to Mattie Woody Todd related back to the time of death of Alex Gray Todd and fully ratified and validated acts done by her in connection with effecting the settlement of any and all claims arising from the death of Alex Gray Todd."

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From a judgment sustaining the plea in bar and dismissing the action, plaintiff appealed.

Alvis A. Lee and Herman L. Taylor for plaintiff appellant.

Henson, Donahue & Elrod by Perry C. Henson for defendant appellee, Harvey Adams, M.D.

Jordan, Wright, Nichols, Caffrey & Hill by William B. Rector, Jr., for defendant appellee, Randolph Hospital, Inc.

HEDRICK, Judge.

The only question requiring discussion on this appeal is whether the release executed by Mattie Woody Todd prior to her appointment as administratrix of her husband's estate is a bar to an action for the wrongful death of her husband instituted subsequent to her appointment as administratrix of his estate.

The amount recovered in an action for wrongful death is not liable to be applied as assets of the estate, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding \$500.00, but shall be disposed of as provided in the Intestate Succession Act. G.S. 28-173. The right of action for wrongful death is purely statutory, and it may be brought only "by the executor, administrator or collector of the decedent. . . ." G.S. 28-173; *Graves v. Welborn*, 260 N.C. 688, 133 S.E. 2d 761 (1963); *Reid v. Smith*, 5 N.C. App. 646, 169 S.E. 2d 14 (1969). A widow, as such, has no right of action for the death of her husband. *Graves v. Welborn*, *supra*; *Howell v. Comrs.*, 121 N.C. 362, 28 S.E. 362 (1897). Therefore, being unable to maintain a claim for wrongful death, the wife cannot execute a release for such a claim that would be binding on the estate unless she is first appointed the personal representative of the estate.

The judgment appealed from is

Reversed.

Judges BRITT and BAILEY concur.

Little v. Little

JEAN H. LITTLE v. JUNE C. LITTLE

No. 7422DC697

(Filed 18 September 1974)

Divorce and Alimony § 16— award of attorney fees — sufficiency of evidence to support

Evidence in an action for alimony without divorce, alimony pendente lite, and child custody and support which tended to show that services performed by plaintiff's attorney were difficult and time consuming and resulted in substantial benefit to plaintiff was sufficient to support the trial court's award of \$6480 as attorney fees.

APPEAL by defendant from *Cornelius, Judge*, 20 May 1974 Session of District Court held in DAVIDSON County.

Heard in the Court of Appeals 4 September 1974.

This action was begun 8 June 1970. Plaintiff-wife sought alimony without divorce, alimony *pendente lite*, child custody and support, and attorney fees. Following a hearing on 22 June 1970, judgment was entered for the plaintiff, and defendant appealed. This Court affirmed the judgment. See *Little v. Little*, 9 N.C. App. 361, 176 S.E. 2d 521, wherein the facts of the case not pertinent to this appeal are more fully stated.

Prior to trial in the District Court, and after extended negotiations, settlement was reached between the parties, and a consent judgment entered on 13 May 1974. The judgment provided, among other things, that defendant would pay to the plaintiff \$480 a month for her support and \$175 a month for the support of each of two minor children, that defendant would provide a college education for the three minor children, that defendant would convey to plaintiff a life estate in the land and house where plaintiff resided, that defendant would carry medical and hospital insurance on the three minor children, that defendant would establish a \$100,000 testamentary trust giving plaintiff the income for life with the corpus to go to the children, and that defendant would pay reasonable attorney fees for services rendered since 22 June 1970.

On 20 May 1974 a hearing was held to determine the amount of attorney fees to be paid. Plaintiff offered into evidence affidavits of Walter Foil Brinkley, plaintiff's attorney, and of two other attorneys, as well as defendant's deposition and answer to plaintiff's interrogatories. No evidence was sub-

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mitted by defendant. After hearing, the trial judge made extensive findings of fact concerning the services rendered by plaintiff's attorney which included numerous conferences, preparation and argument of the first appeal to this Court, discovery procedures to determine the nature and extent of defendant's property, which exceeded \$900,000, preparation for trial upon several occasions, and the negotiation of a settlement reached after a period of over two years. He further found that the reasonable value of the services rendered to plaintiff by her attorney was \$6,480 and awarded the sum of \$6,480 as attorney fees.

From this judgment defendant appealed.

Walser, Brinkley, Walser and McGirt, by Walter Foil Brinkley, for plaintiff appellee.

Grubb and Penry, by J. Rodwell Penry, Jr., for defendant appellant.

BALEY, Judge.

The sole question raised on this appeal is whether the amount awarded to plaintiff's attorney for his services was unreasonable and constituted an abuse of discretion by the trial judge.

It is well established that the amount of the allowance for attorney fees is in the discretion of the trial court and is reviewable only upon showing an abuse of discretion. *Stanback v. Stanback*, 270 N.C. 497, 155 S.E. 2d 221; *Stadiem v. Stadiem*, 230 N.C. 318, 52 S.E. 2d 899.

It seems clear that the services performed by plaintiff's attorney in this case were difficult and time consuming and resulted in substantial benefit to the plaintiff. The evidence presented was ample to sustain the findings of fact made by the court. Under the facts found we see no abuse of discretion in the award of the attorney fee.

Affirmed.

Judges BRITT and HEDRICK concur.

In re Brown

IN THE MATTER OF VIRGIL RAY BROWN

No. 7418DC577

(Filed 18 September 1974)

1. Judgments § 17; Rules of Civil Procedure § 60— motion for relief from order — order not void

Order pertaining to custody of a dependent child was not void, and respondent's motion for relief from the order under Rule 60(b) (4) was properly denied, where the court had jurisdiction over the parties and subject matter and had authority to render the judgment entered.

2. Rules of Civil Procedure § 60— motion for relief from prior order

Motion for relief from a prior order under Rule 60(b) (6) on the ground the order was contrary to law was properly denied since Rule 60(b) (6) cannot be used as a substitute for appeal and an appeal from an order denying relief under Rule 60(b) does not bring up for review the judgment from which relief is sought.

3. Rules of Civil Procedure § 59— motion for new trial — appellate review

Motion for a new trial made under Rule 59(a) (7) is addressed to the sound judicial discretion of the trial judge, whose ruling, in the absence of abuse of discretion, is not reviewable on appeal.

APPEAL by respondent from *Gentry, District Judge*, 27 February 1974 Session of District Court held in GUILFORD County.

After hearing held on petition of the paternal grandmother of an illegitimate 2½-year-old boy which alleged the child to be a neglected and dependent child as defined in G.S. 7A-278, the district court by order dated 28 November 1973 found the child to be a "dependent child" and placed the child in the custody of the petitioning grandmother. Respondent, the child's mother, had been duly served with notice of the hearing, but failed to appear. On 11 December 1973 respondent filed a motion for review and at a hearing on this motion, which was held on 28 December 1973, the court heard additional evidence, including testimony of respondent who was represented by counsel. Following the second hearing the court entered an order dated 28 December 1973 making additional findings of fact, including findings that the child was being satisfactorily cared for by the paternal grandmother, that he was being supported by the father and the paternal grandmother, and that it was in his best interest that he remain in custody of the paternal grandmother. Accordingly, the court dismissed respondent's motion for review.

In re Brown

Respondent did not appeal from the 28 December 1973 order but on 31 December 1973 filed a motion seeking relief from that order under G.S. 1A-1, Rule 60(b) (4) on the ground that the order was void and under Rule 60(b) (6) on the ground that it was contrary to law. In the alternative respondent moved for a new trial under Rule 59(a) (7) on the ground that the order was contrary to law. After hearing on these motions, the court on 27 February 1974 entered order denying the same, and respondent appealed.

No counsel for petitioner appellee.

David B. Smith for respondent appellant.

PARKER, Judge.

No appeal having been taken from the prior orders, the only matter before this court for review is the order of 27 February 1974 which denied respondent's motions in which she sought relief from the 28 December 1973 order or, in the alternative, sought a new trial.

[1] Respondent's motion for relief under Rule 60(b) (4), made on the ground that the prior order from which respondent sought relief was void, was properly denied. Clearly, the 28 December 1973 order was not void, since the court had jurisdiction over the parties and the subject matter and had authority to render the judgment entered.

[2] Respondent's motion under Rule 60(b) (6), made on the ground that the prior order from which respondent sought relief was contrary to law, was also properly denied. Rule 60(b) (6) cannot be used as a substitute for appeal, 2 McIntosh, N. C. Practice and Procedure (Phillips Supp. 1970) § 1720, and "an appeal from an order denying relief under 60(b) does not bring up for review the judgment from which relief is sought." 7 Moore's Federal Practice, § 60.30[1].

[3] Finally, respondent's motion for a new trial, made under Rule 59(a) (7), was addressed to the sound judicial discretion of the trial judge, whose ruling, in the absence of abuse of discretion, is not reviewable on appeal. *Glen Forest Corp. v. Bensch*, 9 N.C. App. 587, 176 S.E. 2d 851 (1970). No abuse of discretion has been shown.

Although, as noted above, our appellate review in this case has been limited, a careful reading of the entire record reveals

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that the trial judge was conscientious in seeking to protect the rights of all parties, that he was concerned primarily with the welfare of the child, and that the orders entered were substantially in accordance with law.

Affirmed.

Judges CAMPBELL and VAUGHN concur.

JOE CHRIS HEARNE, JR. v. CLARENCE ODELL SMITH

No. 7419SC625

(Filed 18 September 1974)

Automobiles § 95— negligence of driver imputed to owner passenger

As a result of plaintiff's capacity as owner and status as passenger, the driver's negligence was imputed to him, thereby making plaintiff contributorily negligent as a matter of law and entitling defendant to summary judgment in plaintiff's action for personal injury and property damage resulting from a collision between plaintiff's automobile and defendant's automobile.

APPEAL by plaintiff from *Godwin, Special Judge*, 8 April 1974 Session of Superior Court held in MONTGOMERY County.

Plaintiff seeks compensation for personal injuries and property damage resulting from a collision between plaintiff's automobile in which plaintiff was a passenger and defendant's automobile.

Plaintiff alleges that he was a passenger in his 1967 Plymouth automobile which was being driven by Walter Ivey Smith with the permission of plaintiff. Defendant was driving his automobile. Plaintiff alleges, in his verified complaint, that both Walter Ivey Smith and defendant were driving in a careless and negligent manner so as to proximately cause the accident.

According to plaintiff's allegations, Walter Ivey Smith operated plaintiff's vehicle at an excessive and dangerous rate of speed, failed to exercise a proper lookout, operated plaintiff's vehicle to left of center line of highway and failed to decrease speed in order to avoid the collision with defendant. Plaintiff alleges that this negligence by Walter Ivey Smith was a proxi-

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mate cause of the collision and the resulting injury and damage to plaintiff.

In his answer to plaintiff's complaint, defendant alleges that Walter Ivey Smith was negligent and that his negligence should be imputed to plaintiff, owner-passenger, as a matter of law. Defendant additionally pleads that, even if he were negligent, plaintiff was contributorily negligent under the imputed negligence doctrine.

Defendant moved for summary judgment on the grounds that plaintiff had affirmatively alleged that the driver of his own automobile was negligent at a time when plaintiff was present in the automobile, and that plaintiff was contributorily negligent as a matter of law. Defendant's motion was granted on the grounds that the alleged negligence of Walter Ivey Smith is by law imputed to plaintiff.

Ottway Burton for plaintiff appellant.

Henson, Donahue & Elrod by Daniel W. Donahue for defendant appellee.

VAUGHN, Judge.

Defendant-movant relies on plaintiff's allegation that plaintiff was the owner of and passenger in an automobile which was negligently driven by Walter Ivey Smith so as to proximately cause a collision and resulting injury and damage to plaintiff. Defendant then moves for summary judgment on the grounds that as a result of plaintiff's capacity as owner and status as passenger, Walter Ivey Smith's negligence is imputed to him, thereby making plaintiff contributorily negligent as a matter of law.

"In North Carolina, negligence is imputed to the owner-occupant of an automobile according to the following test: 'Did the owner, under the circumstances disclosed, have the legal right to control the manner in which the automobile was being operated—was his relation to the operation such that he would have been responsible to a third party for the negligence of the driver?'"

Etheridge v. R. R. Co., 7 N.C. App. 140, 144, 171 S.E. 2d 459, 462. Also see *Shoe v. Hood*, 251 N.C. 719, 724, 112 S.E. 2d 543, 548.

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Here, although plaintiff may not have had physical control, he did have the legal right to control, and that is the test.

The application of "imputed negligence" to contributory negligence has been upheld in cases to bar recovery by an owner-occupant. *Etheridge v. R. R. Co.*, *supra*, at 145, 171 S.E. 2d, at 462. Such an application to the present case establishes the contributory negligence of plaintiff, owner-occupant, and thus bars any recovery by plaintiff against defendant.

The foregoing necessitates our conclusion that the movant did satisfy his burden of showing that he was entitled to judgment as a matter of law.

Pursuant to G.S. 1A-1, Rule 56(e), "an adverse party may not rest upon the mere allegations or denials of his pleading" and his response "must set forth specific facts showing that there is a genuine issue for trial." If the adverse party fails to do so, summary judgment shall be entered against him.

Following defendant's motion for summary judgment in the case at bar, plaintiff, as the adverse party, did not meet his burden of coming forward with specific facts showing that there was a genuine issue for trial.

The judgment granting defendant's motion for summary judgment is affirmed.

Affirmed.

Judges CAMPBELL and PARKER concur.

IN THE MATTER OF ANTHONY WAYNE WEHUNT

No. 7418DC492

(Filed 18 September 1974)

Infants § 9— custody of child — evidence insufficient to show mother unfit

The evidence did not amount to convincing proof that the mother was unfit to have custody of her child and was insufficient to support an award of custody to the maternal grandmother.

APPEAL by respondent from *Gentry, District Court Judge*, 6 February 1974 Session of GUILFORD County, District Court Division.

In re Wehunt

The petitioner brought this action to have the infant, Anthony Wehunt, declared a neglected and dependent child within the meaning of G.S. 7A-286. Petitioner is the maternal grandmother of the child. The trial court found that the grandmother had supported the child since birth, that the child was born out of wedlock, that the grandmother objected to the mother's dating married men, and that the mother left the home of the grandmother after a dispute and took the child. Later the mother temporarily returned the child to the grandmother until she could find a place to stay. When the mother returned the child, he was sick and had a temperature of 101 degrees. Whereupon, the grandmother took him to a doctor. The mother went to the home of the Purgasons to live without informing the grandmother and made arrangements for her and the child to live there. The court entered an order awarding custody of the child to the maternal grandmother until the mother could show herself fit for custody.

No counsel for petitioner appellee.

David B. Smith, attorney for respondent appellant.

MARTIN, Judge.

In *Thomas v. Pickard*, 18 N.C. App. 1, 4, 195 S.E. 2d 339 (1973) this Court through Brock, Chief Judge, said, "A court should not take a child from the custody of its parents and place it in the hands of a third person except upon convincing proof that the parent is an unfit person to have custody of the child or for some other extraordinary fact or circumstance." In *Thomas, supra*, this Court reversed an order allowing a maternal grandmother to have temporary custody of a child in derogation of the father's rights. See also 3 Lee, N. C. Family Law, Custody of Children, § 224, page 25.

The evidence in this case does not amount to convincing proof that the mother is unfit. Mrs. Cook, a neighbor of the grandmother, testified that at the time the daughter left the grandmother's house, she did not notice anything unusual about the child. A doctor's letter was introduced into evidence stating that the child had chest congestion but was not seriously sick. The Purgasons testified concerning arrangements by which the mother and child were to stay with them. Also it appears from the evidence that the mother had found employment. Margo Sheppard, a social worker, recommended that the mother have

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custody of the child and testified that the Purgasons' home was clean and adequate.

While we are sure the grandmother would provide the care and attention that this child needs, the evidence is not sufficient to support a finding that the mother is unfit to have custody of her child.

The order appealed from is reversed and the case is remanded.

Reversed and remanded.

Chief Judge BROCK and Judge MORRIS concur.

CONNIE B. SHELTON v. JESSE T. SHELTON

No. 7417DC666

(Filed 18 September 1974)

Appeal and Error § 26— assignment of error to signing and entry of judgment

Assignment of error to the signing and entry of judgment presents only the face of the record for review.

APPEAL by defendant from *Clark, Judge*, 1 March 1974 Session of District Court held in SURRY County. Heard in the Court of Appeals 28 August 1974.

Folger & Folger by Fred Folger, Jr., for plaintiff appellee.

W. Warren Sparrow for defendant appellant.

HEDRICK, Judge.

This is an appeal from an order allowing plaintiff's motion for alimony *pendente lite*, custody and support of minor children, and counsel fees. Appellant's sole assignment of error is to the signing and entry of the judgment. Such an assignment of error presents the face of the record for review, and review is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted, support the conclusions of law and the judgment. But, such an assignment of error does not present for review the

Hardware Co. v. Kilpatrick

findings of fact or the sufficiency of the evidence to support them. 1 Strong, N. C. Index 2d, Appeal and Error, § 26, p. 152.

Suffice it to say, therefore, we have carefully examined the face of the record and find no error thereon. The findings of fact, which are in considerable detail, support the conclusions of law, which in turn support the order appealed from.

Affirmed.

Judges BRITT and BALEY concur.

ODELL HARDWARE COMPANY, INC. v. ALFRED KILPATRICK AND
JANIE KILPATRICK, INDIVIDUALLY AND DOING BUSINESS AS KIL-
PATRICK APPLIANCE SERVICE; AND TIRE AND APPLIANCE CENTER, INC.

No. 7418SC608

(Filed 18 September 1974)

Courts § 6— appeal to superior court from clerk

Plaintiff's appeal from an order of the clerk of superior court vacating and setting aside judgment of default entered against defendants was made within the time allowed by statute and should have been heard by the superior court judge on its merits.

APPEAL by plaintiff from *Long, Judge*, 18 March 1974 Session of Superior Court held in GUILFORD County.

Plaintiff filed this action to recover on a debt allegedly owed by defendants. None of the defendants filed answer and judgment in favor of plaintiff was entered on 21 February 1972.

On 26 March 1973, on motion of the individual defendants, the Clerk of Superior Court ordered that the judgment by default entered against them be vacated and set aside. Plaintiff, well within the time allowed by statute, appealed to the Judge of Superior Court having jurisdiction.

On 25 March 1974, Judge Long entered an order wherein he concluded that plaintiff was guilty of laches by reason of the failure to cause the appeal from the Clerk to be heard by a judge of the Superior Court at an earlier date. Plaintiff's appeal from the Clerk was dismissed.

Nowell v. Nowell

Jordan, Wright, Nichols, Caffrey & Hill by James E. Coltrane, Luke Wright and Lindsay R. Davis, Jr., for plaintiff appellant.

No counsel on appeal for defendant appellee.

VAUGHN, Judge.

The Judge should have heard plaintiff's appeal from the Clerk on its merits. The order dismissing the appeal was improvidently entered and must be vacated.

Vacated and remanded.

Judges CAMPBELL and PARKER concur.

MARY H. NOWELL v. JOHN B. NOWELL

No. 7421DC580

(Filed 18 September 1974)

Divorce and Alimony § 19— modification of custody order— absence of notice

Order modifying previous child custody orders must be vacated where it was entered without notice to defendant.

APPEAL by defendant from *Clifford, District Court Judge*, 25 February 1974 Session of District Court held in FORSYTH County.

Joseph B. Roberts III for plaintiff appellee.

Forrest A. Ferrell for defendant appellant.

VAUGHN, Judge.

The order from which defendant appeals modifies orders previously entered, after notice and hearing, respecting the custody of minor children of the parties. Defendant's assignment of error is that the present order was entered without notice or the opportunity to be heard. Defendant's exception is well taken. The order is vacated.

Vacated and remanded.

Judges CAMPBELL and PARKER concur.

Perry v. Board of Alcoholic Control

MURPHY NICKEL PERRY T/A PERRY'S GROCERY & SERVICE
STATION, PETITIONER v. NORTH CAROLINA STATE BOARD OF
ALCOHOLIC CONTROL, RESPONDENT

No. 7410SC344

(Filed 18 September 1974)

Intoxicating Liquor § 2— revocation of beer license — sufficiency of evidence

Evidence that defendant, on two separate occasions, sold a six-pack of beer on Sunday in violation of the law was sufficient to support revocation of his beer license.

APPEAL by petitioner from *Hobgood, Judge*, 3 December 1973, Civil Session, WAKE County Superior Court. Heard in the Court of Appeals 29 August 1974.

The petitioner had his beer license revoked for a period of thirty (30) days by the defendant-respondent. He duly appealed to the superior court for a review, and thereafter the judge of the superior court sustained the action of the respondent. The petitioner thereupon appealed to this Court.

Attorney General Robert Morgan by Associate Attorney James Wallace, Jr., for the respondent appellee.

Hubert H. Senter for petitioner appellant.

CAMPBELL, Judge.

The evidence shown by the record reveals that the defendant, on two separate occasions, sold a six-pack of beer on Sunday in violation of the law.

The evidence was competent and substantial and fully supported the findings of fact. The findings of fact fully and adequately supported the adjudication of Judge Hobgood.

Affirmed.

Chief Judge BROCK and Judge VAUGHN concur.

State v. Quick

STATE OF NORTH CAROLINA v. JOHN QUICK

No. 7418SC673

(Filed 18 September 1974)

APPEAL by defendant from *Copeland, Special Judge*, 22 April 1974 Regular Criminal Session of GUILFORD Superior Court, High Point Division. Heard in the Court of Appeals 27 August 1974.

Defendant was charged in a bill of indictment with assault with intent to commit rape in violation of G.S. 14-22. Defendant pleaded not guilty and was tried by a jury.

The State offered evidence tending to show that the defendant actually committed an assault with intent to force Jeanette Little, a female, age twelve (12) years, to have sexual relations with him and that she was afraid for her physical safety.

The defendant's evidence was principally that of the defendant's own denial of the charges, and other evidence seeking to show that he was not with Jeanette Little on the day in question.

The jury returned a verdict of guilty as charged in the bill of indictment.

Attorney General Robert Morgan by Associate Attorney Keith L. Jarvis for the State.

Hugh C. Bennett, Jr., for the defendant appellant.

CAMPBELL, Judge.

The evidence on behalf of the State was sufficient to require submission of the case to the jury. Counsel for defendant frankly admits that no prejudicial error was committed at trial. The State in its brief agrees. We have examined the various assignments of error and the record proper and find no prejudicial error.

Affirmed.

Judges PARKER and VAUGHN concur.

State v. Moore

STATE OF NORTH CAROLINA v. STONEY LEE MOORE

No. 7419SC561

(Filed 18 September 1974)

APPEAL by defendant from *Lupton, Judge*, 4 February 1974 Session of RANDOLPH County Superior Court. Heard in the Court of Appeals 4 September 1974.

Defendant was tried and convicted of the offense of driving a motor vehicle while under the influence of intoxicating liquor in violation of G.S. 20-138. The State offered the testimony of the arresting officer who testified that he observed defendant's car swerve to the right and back to the left as it approached a stoplight; that there was a vehicle between the defendant's car and the officer's marked patrol car; that as the officer passed this vehicle defendant's car went completely in the opposite lane; that he stopped the car and found the defendant to be the driver; that he detected a strong odor of alcohol on defendant's breath and that he placed defendant under arrest for driving under the influence.

The highway patrolman who gave defendant a breathalyzer test testified that the result of the test indicated defendant's blood alcohol content was 0.14 percent by weight.

Defendant testified that although he had consumed some alcoholic beverages, he was not intoxicated and that he swerved his car only to avoid hitting a manhole cover. A witness for the defendant, who was riding in the car at the time of the arrest, testified that the defendant did not appear to be abnormal in any way prior to the time he was stopped. A witness for the defendant also testified to his good character and reputation. Defendant's motion for a dismissal at the close of the State's evidence and at the close of all of the evidence was denied.

The jury returned a verdict of guilty of the offense of driving under the influence and the defendant appealed from judgment entered on the verdict.

Attorney General Carson, by Assistant Attorney General Banks, for the State.

Bell, Ogburn and Redding, by Deane F. Bell, for defendant appellant.

State v. Stack

MORRIS, Judge.

Defendant presents the record for review for possible errors. We have carefully reviewed the record and find that defendant had a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. JOHN HENRY STACK

No. 7420SC586

(Filed 18 September 1974)

APPEAL by defendant from *Martin, (Robert M.)*, *Special Judge*, 4 February 1974 Session of Superior Court held in UNION County.

Attorney General Robert Morgan by Robert P. Gruber, Associate Attorney, for the State.

James E. Griffin for defendant appellant.

VAUGHN, Judge.

Defendant was convicted of the felony of robbery and judgment imposing a lawful prison sentence was entered. Defendant does not bring forward any assignments of error but asks this Court to review the record for possible error of law. We have done so and find no prejudicial error.

No error.

Judges CAMPBELL and PARKER concur.

Lewis v. College

H. MICHAEL LEWIS v. SALEM ACADEMY AND COLLEGE, JOHN H. CHANDLER, INDIVIDUALLY AND AS PRESIDENT OF SALEM COLLEGE, AND SALEM ACADEMY AND COLLEGE BOARD OF TRUSTEES

No. 7421SC623

(Filed 2 October 1974)

1. Colleges and Universities; Contracts § 25— college professor — employment contract — continuation after age 65 discretionary

Plaintiff's complaint failed to state a claim upon which relief could be granted where plaintiff alleged that he worked for the college under a series of one-year contracts which provided that normal retirement came at age 65, that employment beyond that age was possible but that possibility existed only upon recommendation of the administration and at the discretion of the Board of Trustees, plaintiff's employment was continued on a year-to-year basis for two years after plaintiff turned 65, the express language of the controlling documents disclosed by plaintiff's complaint established that further continuation of his employment remained in the discretion of the Board of Trustees and the Trustees did not exercise that discretion to offer plaintiff a job for the three years remaining before he turned 70.

2. Contracts § 12; Customs and Usages— construction of employment contract — custom or usage explained

A custom or usage may be proved in explanation and qualification of the terms of a contract which otherwise would be ambiguous, or to show that the words in which the contract is expressed are used in a particular sense different from that which they usually import, and, in some cases, to annex incidents to the contract in matters upon which it is silent, but evidence of a usage or custom is never admitted to make a new contract or to add a new element to one previously made; therefore, plaintiff's contention that his forced retirement prior to age 70 contravened the "common law" of defendant college was without merit, since specific paper writings set out in clear and unambiguous language the conditions under which his employment after age 65 could be continued.

APPEAL by plaintiff from *McConnell, Judge*, 11 March 1974 Session of Superior Court held in FORSYTH County.

From 1950 until 30 June 1973 plaintiff was a professor at Salem College. The College did not renew his employment after the close of the 1972-1973 academic year. Contending he has the right to continue teaching for three additional years until he becomes 70, he brought this action to recover salary and other benefits to accrue during the three-year period.

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In his complaint, filed 5 February 1974, plaintiff in substance alleged:

He was employed as a professor at Salem College in the fall of 1950 and thereafter for successive years under a series of one-year contracts. Prior to the 1971-1972 academic year he reached age 65. The 1971-1972 Faculty Guide of Salem College, incorporated by reference in all appointment contracts and a copy of which was attached as an exhibit to the complaint, contained the following:

“Normal RETIREMENT of faculty and administrative personnel comes at the close of the academic year in which a person reaches age 65. If age 65 is reached in the summer months prior to September 1, retirement is considered to have been reached at that time.

“Continuation of service beyond age 65 is possible until age 70 upon request of the individual and recommendation of the administration, and at the discretion of the Board of Trustees. When service is extended it is on a year-to-year basis by action of the Board of Trustees. Any faculty member continuing beyond age 68 is automatically relieved of administrative responsibilities, such as Head of Department.”

Prior to his 65th birthday, plaintiff notified the then President of the College that he wished to continue to teach until age 70. The College in turn offered plaintiff an appointment contract for the 1971-1972 school year similar to previous appointment contracts. This contract, a copy of which was attached as an exhibit to the complaint, contains the following:

“SALEM ACADEMY AND COLLEGE
Winston-Salem, North Carolina

APPOINTMENT CONTRACT AND COMPENSATION

SUMMARY
For 1971-1972

Name: H. Michael Lewis

Rank: Prof. and Head, Dept. of Modern
Languages

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Tenure: Continuous

This statement of appointment is made with the approval of the Board of Trustees. When it has been signed in duplicate by the appointee and one copy has been returned to the President, it constitutes a contract. In addition to the base salary and fringe compensatory benefits listed below, this agreement is understood by both parties to include policies on academic freedom and tenure, retirement, sabbatical leaves, sick leaves and other privileges and responsibilities as legislated by the Board of Trustees as well as regulations and policies adopted by the faculty and/or required by the administration for proper functioning of the college. These matters are published annually in the faculty guide and are made available to faculty and administrative employees."

(This contract then contains a detailed statement as to base salary and other employment benefits. It was signed on 2 April 1971 in the name of the College by its President and contains the signed acceptance of the plaintiff.)

The continuation of employment of a faculty member until age 70 was a usual and customary practice of Salem College, and the right to continued employment until age 70 became an implied part of the benefits and considerations offered by Salem College to induce teachers to accept employment and remain at Salem College. During the academic year 1971-1972 a change occurred in the administration of Salem College and a new President was installed. On 14 January 1972 the new President announced by letter a new administrative interpretation of Salem's retirement policy. Pursuant to this new interpretation, plaintiff was forced to retire at the end of the 1972-1973 academic year. Plaintiff's forced early retirement was based solely on the fact that he was over 65 years old, and his mandatory retirement prior to age 70 was "contrary to the assurances and representations of the previous administration, in contravention of the 'common law' of Salem College, and in direct violation of the contract between the College and the Plaintiff that provided for Plaintiff's continued employment until age 70, and in direct violation of the 1971-1972 Faculty Guide provisions as of the date of the contract of forced retirement."

Also attached to the complaint as exhibits were copies of the letter dated 14 January 1972 from the new President ad-

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dressed to all members of the faculty, the 1972-1973 Faculty Guide, and the final appointment contract dated 31 March 1972 between plaintiff and the College covering his employment for the 1972-1973 year. This last document was signed by plaintiff, contains after the word "Tenure" the words: "Retirement scheduled for June 30, 1973," and contains the sentence:

"In view of the retirement schedule, this will be the final regular full-time contract, as per regulations and policies published in the Faculty Guide and elsewhere."

Other allegations in the complaint will be referred to in the opinion.

Defendants moved under Rule 12(b) (6) to dismiss the complaint for failure to state a claim upon which relief can be granted. The motion was allowed, and plaintiff appealed.

Meyressa H. Schoonmaker, William G. Pfefferkorn, Charles O. Peed, and M. Beirne Minor for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice by Charles F. Vance, Jr. and W. Andrew Copenhaver for defendant appellee.

PARKER, Judge.

Rule 12(b) (6) of the North Carolina Rules of Civil Procedure is identical to Rule 12(b) (6) of the Federal Rules. It is appropriate, therefore, to turn to decisions under the Federal Rule 12(b) (6) for guidance in applying our own. In this regard, the author of Moore's Federal Practice summarizes federal decisions as follows:

"The motion to dismiss under Rule 12(b) (6) performs substantially the same function as the old common law general demurrer. A motion to dismiss is the usual and proper method of testing the legal sufficiency of the complaint. For the purposes of the motion, the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted.

" 'A [complaint] may be dismissed on motion if clearly without any merit; and this want of merit may consist in

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an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim.' But a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.* Pleadings are to be liberally construed." 2A Moore's Federal Practice, 2d Ed., § 12.08.

Applying these principles to the complaint in the present case, we agree with the trial court that plaintiff failed to state a claim upon which relief can be granted.

[1] Plaintiff's complaint, with its attached exhibits, sets forth in considerable detail the transactions and occurrences which he intends to prove to show that he is entitled to relief. It is, therefore, amply sufficient to give the court and the parties notice of these as required by Rule 8(a) (1). Should he prove them all, however, he would fail to show any basis upon which relief against defendants can be granted. Indeed, he would show exactly to the contrary, that there is no basis upon which he is entitled to relief. Thus, the difficulty with plaintiff's complaint is not that it fails to give notice with sufficient particularity of the transactions intended to be proved, but that as a matter of substantive law such transactions do not give rise to any claim upon which relief can be granted.

Plaintiff alleged that throughout the entire time of his employment by defendant College he worked under a series of one-year contracts. Two of these, the contract for 1971-1972 and the contract for 1972-1973, were attached as exhibits to his complaint. He alleged, and examination of these exhibits confirms, that the Faculty Guide of Salem College was incorporated by reference into all appointment contracts. A copy of that Guide was also attached as an exhibit to the complaint. He alleged that "from 1950 until September 7, 1973, the retirement provisions of the Faculty Guide remained the same. . . ." Thus, his allegations and exhibits establish that throughout the entire period of his service at the College he was employed under written contracts which provided that "normal retirement" came at age 65, that employment beyond that age was "possible," but that this possibility existed only upon "recommendation of the administration, and at the discretion of the

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Board of Trustees," and that "[w]hen service is extended it is on a year-to-year basis by action of the Board of Trustees." It is difficult to see how language could be more explicit.

Under these provisions plaintiff's employment was in fact continued after he became 65. In conformity with the Faculty Guide, this continuation was on a year-to-year basis. This was done under two successive written contracts, each of which was accepted and signed by plaintiff. Each of these recited that it was "made with the approval of the Board of Trustees." The second of these, covering plaintiff's employment for 1972-1973, contains the statement: "Retirement scheduled for June 30, 1973," and the further statement that "[i]n view of retirement schedule, this will be the final regular full-time contract, as per regulations and policies published in the Faculty Guide and elsewhere." Thus, the express language of the controlling documents disclosed by plaintiff's complaint establishes that further continuation of his employment remained in the discretion of the Board of Trustees and that he has no right to relief because the Trustees did not exercise that discretion in the manner which he desired.

In paragraph VI of the complaint, plaintiff refers to the word "continuous" which appears after the word "tenure" in his appointment contract for 1971-1972, and alleges that "this offer of continuous employment, made after Plaintiff's 65th birthday, was to be in effect until Plaintiff reached age 70 subject to termination for cause only." That the single word, "continuous," in the context in which it appears, amounted to an offer of continuous employment on any terms or for any period beyond that expressly covered by the document in which the word appeared, is an unwarranted conclusion drawn by plaintiff. Such a conclusion is not taken as admitted in considering defendants' 12(b) (6) motion. To construct from the single word "continuous," as that word appears in the 1971-1972 appointment contract, an offer, acceptance, and binding five-year contract as plaintiff contends, requires construction of a much bigger building than can be successfully accomplished with one small brick.

[2] Other portions of the complaint also contain allegations which, in our view, amount to no more than plaintiff's own unwarranted deductions or conclusions of law and which fail

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to serve as a basis upon which any relief can be granted. These include allegations concerning the "usual and customary practice" of Salem College to allow a faculty member to teach, upon his request, until age 70, provided he was competent and capable of discharging his duties. From this, plaintiff arrives at what he refers to as the "common law" of Salem College, and alleges that his forced retirement prior to becoming 70 was in contravention of that "common law" and in violation of implied provisions of his contract. In some contexts courts have found it useful to speak in terms of "the common law of a particular industry or a particular plant," *United Steelworkers v. Warrior and G. Nav. Co.*, 363 U.S. 574, 4 L.Ed. 2d 1409, 80 S.Ct. 1347 (1960). For example, such a "common law" has been deemed to exist as a supplement to an industrial collective bargaining agreement covering many employees in a wide variety of situations about which the contract was generally silent. Here, however, plaintiff had his own individual written contracts of employment, and the Faculty Guide, which was expressly incorporated into each of these contracts, specifically covered in clear and unambiguous language the conditions under which his employment after age 65 might be continued. "A custom or usage may be proved in explanation and qualification of the terms of a contract which otherwise would be ambiguous, or to show that the words in which the contract is expressed are used in a particular sense different from that which they usually import, and, in some cases, to annex incidents to the contract in matters upon which it is silent; but evidence of a usage or custom is never admitted to make a new contract or to add a new element to one previously made." 55 Am. Jur., Usages and Customs, § 31, p. 292.

Plaintiff's allegations that he declined other employment and arranged his affairs in reliance upon his expectations that he would continue to teach until age 70 at Salem College likewise create no basis for imposing a legal obligation upon the college in direct contradiction to the rights which it clearly retained under the written contract between the parties. Nor do we find any legal basis upon which to support a claim for relief in plaintiff's conclusory allegations that denial of his continued employment would be "unconscionable" and "would result in the defendant being unjustly enriched."

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The judgment allowing defendants' motion and dismissing plaintiff's action is

Affirmed.

Judges CAMPBELL and VAUGHN concur.

CLAUDE S. KIDD, JR., THOMAS H. COLLINS, AND DAVID P. DILLARD v. C. F. EARLY AND WIFE, BESSIE D. EARLY

No. 7418SC698

(Filed 2 October 1974)

1. Vendor and Purchaser § 3— option — sufficiency of description

Description of land in an option contract which refers to "200 acres more or less of the C. F. Early farm. To be determined by new survey furnished by sellers." is only latently ambiguous since the identification of the property may be determined with certainty from the survey referred to in the option; therefore, parol and other evidence is admissible to fit the description to the land. G.S. 22-2.

2. Vendor and Purchaser § 1— option — essential terms of agreement

A written option contained all the essential terms of the agreement within the purview of the statute of frauds where it identified the vendors and vendees, stated that the purchase price of the 200 acres was \$600 per acre, and sufficiently identified the property to be sold, notwithstanding the option was silent as to the terms of purchase, since payment in cash will be implied by law.

Judge BRITT dissenting.

APPEAL by plaintiffs from *Lupton, Judge*, 22 April 1974 Session of Superior Court held in GUILFORD County. Heard in the Court of Appeals on 29 August 1974.

This is a civil action wherein the plaintiffs (purchasers) seek specific performance of an alleged contract to purchase real property from the defendants (sellers).

The plaintiffs in their complaint alleged that on 4 August 1972 the defendants granted to Claude S. Kidd, Jr., and Howard M. Coble an option to purchase two hundred acres of the C. F. Early Farm in Guilford County. They alleged that this option was extended by the defendants for an additional thirty days by

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a paper writing dated 1 September 1972, marked Plaintiffs' Exhibit A, which reads as follows:

"NORTH CAROLINA
GUILFORD COUNTY

In consideration of the sum of five hundred Dollars (\$500.00) to us in hand paid this day by Howard Coble & Claude Kidd the receipt of which is hereby acknowledged, we, C. F. Early & Bessie D. Early hereby irrevocably agree to convey to Howard M. Coble & Claude S. Kidd upon demand by him within 30 days from the date hereof, upon the terms and conditions hereinafter set out, a certain tract or parcel of land located in Monroe Township, Guilford County, North Carolina, and described as follows: 200 acres more or less of the C. F. Early farm. To be determined by new survey furnished by sellers.

We agree within the time specified, to execute and deliver to Howard M. Coble & Claude S. Kidd or assignee, upon demand by him, a good and sufficient deed for the above described premises upon payment by him to us of the sum of Six hundred per acre Dollars (\$600.00) under the following terms and conditions:

In the event of the exercise of this option by Howard M. Coble & Claude S. Kidd, the payment of Five Hundred Dollars (\$500.00) this day made shall be credited on the purchase price, and the said purchasers may have reasonable additional time for title examination. This option is placed through G. A. Westbrook our real estate agent, and we agree to pay said agent _____ % commission for handling said sale in the event _____ exercises his option hereunder.

This option being a 30 day extension of option drawn 8-4-72.

C. F. EARLY	(SEAL)
BESSIE D. EARLY	(SEAL)"

The plaintiffs further alleged that they accepted the option by mailing the following letter, Plaintiffs' Exhibit B, to the defendants on 29 September 1972.

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“Mr. C. F. Early
Mrs. Bessie D. Early
Route 1
Browns Summit, North Carolina

Dear Mr. and Mrs. Early:

The option granted by you on September 1, 1972, for the purchase of 200 acres more or less of the C. F. Early farm in Monroe Township, Guilford County, North Carolina, is hereby exercised by delivery of a check to your joint order in the sum of \$119,000 to my attorneys, Clark & Tanner, 227 Jefferson Building, Greensboro, North Carolina, to be held in trust for you and given over to you upon the occurrence of the following conditions:

(1) The furnishing of a new survey by you of the land being sold as provided in the option agreement;

(2) Delivery by you of a good and marketable warranty deed in fee simple absolute, free of all encumbrances, to the property covered by the option agreement.

If the survey determines that the land covered by the option consists of more than 200 acres, an additional check will be delivered for the amount in excess of 200 acres to our attorneys as Trustee for you. If the survey determines that the land covered by the option is less than 200 acres, you will be expected to refund to us such difference in purchase price. Please arrange to have the survey completed at the earliest possible date in order that this matter may be expedited. After delivery of the survey and preparation of the deed by your attorney, a reasonable time will be taken for title examination prior to final closing by Clark & Tanner with you.

I will expect to honor my verbal commitments (1) to allow you to harvest crops you now have in the field; (2) to lease to you acreage we discussed for your planting tobacco next year in order to allow you to make up tobacco poundage you lost this year. We will expect to have possession of the buildings on the premises, however, immediately after the final closing.

Yours very truly,
/s/ CLAUDE S. KIDD

MTB

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THE DUTIES AS TRUSTEE PROVIDED IN THIS LETTER
ARE HEREBY ACCEPTED.

CLARK & TANNER
BY: DAVID M. CLARK"

The plaintiffs further alleged that on 29 September 1972 and that at all times thereafter they were ready, willing, and able to purchase the land described in the option.

The defendants filed answer admitting the granting of the option described in the complaint. The defendants further admitted that the plaintiff, Claude S. Kidd, Jr., mailed Exhibit B but denied that this letter was a valid acceptance of the option by the plaintiffs. The defendants denied all other material allegations in the complaint and, in addition thereto, pleaded G.S. 22-2, the statute of frauds, in bar of the plaintiffs' claim.

The plaintiffs and defendants filed motions for summary judgment.

An examination of the pleadings, exhibits, interrogatories, depositions, and affidavits filed in support of and in opposition to the motions for summary judgment tends to show the following: On 29 September 1972, Claude S. Kidd, Jr., mailed a letter to the defendants, C. F. Early and Bessie D. Early, purporting to exercise the option granted by them on 1 September 1972. The defendants acknowledged that they received this letter. Sometime after 1 September 1972, Howard M. Coble assigned his rights under the option to Claude S. Kidd, Jr., who then orally assigned a one-third interest in the option to both Thomas H. Collins and David P. Dillard. Both Thomas H. Collins and David P. Dillard authorized Claude S. Kidd, Jr., to exercise the option on their behalf. Frank Whitaker, Jr., President of the Federal Land Bank Association of Winston-Salem, was prepared to issue a firm commitment to the plaintiffs for a \$100,000.00 loan on or about 1 October 1972. In making his appraisal of the property, C. F. Early pointed out to Whitaker the approximate boundaries of the portion of his farm that he was prepared to convey. C. F. Early, while standing in his yard, also pointed out to Claude S. Kidd, Jr., the boundaries of the land to be sold. On 29 September 1972 Claude S. Kidd, Jr., had \$17,173.37 in his checking account. In addition, the plaintiffs collectively had cash, readily marketable securities, and other assets of well over \$15,000.00 which was available to be applied towards the purchase price. Furthermore, financial

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statements of the plaintiffs show that as of 30 September 1972, Claude S. Kidd, Jr., had a net worth of \$102,200.00; that as of 1 October 1972, David P. Dillard had a net worth of \$128,990; and that as of 1 October 1972, Thomas H. Collins had a net worth of \$30,410.00. On 4 October 1972, Granger A. Westbrook, at the request of C. F. Early, procured a survey map from the office of Jerry C. Callicut & Associates, Inc., and delivered it to Claude S. Kidd, Jr. This map was a survey of the portion of the farm that the defendants intended to retain. Early had ordered the survey to be made approximately three weeks prior to 4 October 1972. The survey map, Plaintiffs' Exhibit 4, shows that C. F. Early intended to retain 40.52 acres of the farm. Plaintiffs' Exhibits 5 and 6, which are deeds to C. F. Early and Bessie D. Early, indicate that the C. F. Early Farm contains 252.94 acres.

From an order denying plaintiffs' motion for summary judgment and entry of summary judgment for the defendants, plaintiffs appealed.

Clark, Tanner & Williams by Eugene S. Tanner, Jr., for plaintiff appellants.

Griffin, Post & Deaton by Hugh P. Griffin, Jr., and William F. Horsley, and Sapp and Sapp by Armistead W. Sapp, Jr., and W. Samuel Shaffer II, for defendant appellees.

HEDRICK, Judge.

Plaintiffs contend that the court erred in denying their motion for a summary judgment and in entering summary judgment for the defendants. While the record, in our opinion, clearly demonstrates that there are genuine issues of material fact, summary judgment for the defendants was proper if the contract sued on is so indefinite in its terms as not to satisfy the requirements of G.S. 22-2, the statute of frauds, which in pertinent part provides:

"All contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."

It is generally recognized in this jurisdiction " . . . that a deed conveying land, or a contract to sell or convey land, or a

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memorandum thereof, within the meaning of the statute of frauds, G.S., 22-2, must contain a description of the land, the subject matter thereof, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the deed, contract or memorandum refers." *Searcy v. Logan*, 226 N.C. 562, 565, 39 S.E. 2d 593, 595 (1946).

The inquiry that is to be made with reference to the description of the land is whether it contains a patent ambiguity. "There is a patent ambiguity when the terms of the writing leaves the subject of the contract, the land, in a state of absolute uncertainty, and refer to nothing extrinsic by which it might possibly be identified with certainty." *Lane v. Coe*, 262 N.C. 8, 13, 136 S.E. 2d 269, 273 (1964) (citations omitted). Parol evidence is not permitted to aid the description if there is a patent ambiguity. *Lane v. Coe*, *supra*; *Powell v. Mills*, 237 N.C. 582, 75 S.E. 2d 759 (1953).

"A description is said to be latently ambiguous if it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made." *Lane v. Coe*, *supra* at 13. Where there is a latent ambiguity in the description of the land, parol and other evidence is permitted to show that the extrinsic matter fits the description to the land. *Lane v. Coe*, *supra*; *Gilbert v. Wright*, 195 N.C. 165, 141 S.E. 577 (1928).

[1] In the instant case, the option clearly refers to "200 acres more or less of the C. F. Early farm. To be determined by new survey furnished by sellers." We are of the opinion that the description of the land which is the subject of the option is insufficient in itself but that reference in the option to a survey to be provided by seller makes the ambiguity of the description latent rather than patent. Identification of the property may be determined with certainty from the survey referred to in the option. Thus, since the ambiguity in the instant case is latent, parol and other evidence is admissible to fit the description to the land.

[2] The second issue to be considered is whether the option fails to meet the requirements of the statute of frauds in that it does not contain all the essential terms of the agreement. The defendants assert that because the option is silent as to the terms of purchase, the agreement cannot be enforced. We do not agree.

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We recognize that before a written memorandum can satisfy the statute of frauds "it must contain expressly or by necessary implication the essential features of an agreement to sell." *Lane v. Coe, supra* at 12 (citations omitted). This court in *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 600, 173 S.E. 2d 496, 503 (1970), *cert. denied*, 276 N.C. 728 (1970), stated that the essential elements of the contract were set forth where the instrument "clearly identif[ied] the vendor, the vendee, the purchase price, and . . . the property sold." The court then held that a memorandum will not fail merely because the time for performance (i.e., the closing date and the date possession of the property was to change hands) was not set forth in the memorandum. Rather, the court held that the law will imply that the contract is to be performed within a reasonable time.

Likewise, we are of the opinion that, at least where the memorandum does not provide for the determination of the manner of payment at some time in the future and gives no indication that the parties considered installment terms, payment in cash would be implied by law. See 49 Am. Jur., Statute of Frauds, § 355, p. 666. In the instant case the option clearly identifies the vendors, the vendees, states that the purchase price of the 200 acres is \$600 per acre and, as discussed above, sufficiently identifies the property to be sold. Consequently, we feel that the essential elements of the contract have been set forth in the option and that whether there was a meeting of the minds on the terms of the contract is a question for the jury.

Therefore, since the record clearly demonstrates that there are genuine issues of material fact to be determined at trial and since the option sued on is sufficiently definite in its terms to satisfy the requirements of the statute of frauds, we are of the opinion that the trial court correctly denied the plaintiffs' motion for summary judgment and erred in entering summary judgment for defendants.

The order appealed from is

Affirmed in part; Reversed in part.

Judge BALEY concurs.

Judge BRITT dissents.

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Judge BRITT, dissenting. In my opinion the description of the land set forth in the purported option was not sufficient to survive the statute of frauds. I vote to affirm the judgment appealed from.

REDEVELOPMENT COMMISSION OF WINSTON-SALEM v. CLARA BELLE LEGRAND WEATHERMAN AND HUSBAND, ROMULOUS T. WEATHERMAN

No. 7421SC441

(Filed 2 October 1974)

1. Eminent Domain § 6— sales price of nearby tract — exclusion

In a proceeding to condemn land for urban renewal, the trial court did not err in the exclusion of petitioner's evidence of the sales price of a nearby tract which was only 1/5 the size of the condemned land and which contained two buildings while the condemned land contained three buildings.

2. Trial § 13— condemnation proceeding — denial of jury view

The trial court did not err in the denial of petitioner's motion for a jury view of property condemned for urban renewal. G.S. 1-181.1.

3. Trial § 37— instructions on interested witnesses

In a condemnation proceeding, the trial court did not err in instructing the jury to scan the testimony of interested witnesses with care and caution without further instructing the jury which witnesses were interested and without telling the jury that the court was referring to the witnesses for both sides.

4. Costs § 4— expert witness fees — necessity that witnesses be subpoenaed

The trial court in a condemnation proceeding erred in taxing the costs of respondents' expert witnesses to petitioner since the witnesses were not under subpoena. G.S. 7A-314.

5. Appeal and Error § 2; Waiver § 3— expert witness fees — waiver of right to appeal issue — payment of fees — failure to extend time for docketing appeal

Petitioner in a condemnation proceeding did not waive the right to appeal the issue of the taxing of the costs of respondents' expert witnesses to petitioner by the payment of such fees into court and the failure to obtain an extension of time to docket the record on appeal, thus necessitating a petition for certiorari to obtain appellate review of the case.

6. Attorney and Client § 7; Costs § 4— condemnation proceeding— attorney fees — use of contingent fee

In a condemnation proceeding instituted by a redevelopment commission, the trial court erred in determining counsel fees to be awarded

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to respondents by taking one-third of the difference between what the redevelopment commission had offered respondents and the amount of the jury verdict. G.S. 160-456(10) (h) (3).

ON writ of certiorari to review a trial before *Wood, Judge*, 8 October 1973 Civil Session, FORSYTH County Superior Court. Argued in the Court of Appeals on 26 August 1974.

The Winston-Salem Redevelopment Commission petitioned to condemn the respondents Weatherman's land for urban renewal. Commissioners of Appraisal were appointed to determine the amount of just compensation owed to the respondents. From an appraisal of \$15,500.00, the respondents appealed to Superior Court for a jury trial on the issue of just compensation. The court entered judgment on the verdict for the payment of an award of \$25,400.00 and ordered the petitioner to pay expert witness fees and counsel fees.

Hatfield and Allman, by James W. Armentrout, for petitioner appellant.

White and Crumpler, by Michael J. Lewis and James G. White, for respondents appellees.

MARTIN, Judge.

The Redevelopment Commission of Winston-Salem (hereinafter referred to as "petitioner") brings forward five assignments of error.

[1] First, petitioner assigns as error the trial court's exclusion of evidence which would have shown the sale price of nearby land that was approximately 1/5 the size of the condemned land. Petitioner correctly points out the law in North Carolina regarding the admissibility of the sale price of allegedly comparable property. In *State v. Johnson*, 282 N.C. 1, 191 S.E. 2d 641 (1972) at page 21, the Court says: "Whether two properties are sufficiently similar to admit evidence of the purchase price of one as a guide to the value of the other is a question to be determined by the trial judge in the exercise of a sound discretion guided by law." The question for us is whether the trial court abused its discretion in excluding petitioner's evidence. Petitioner points us to 5 Nichols on Eminent Domain, § 21.31 [3] (1969), quoted with approval in *State v. Johnson, supra*, at page 21:

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“It is not necessarily objectionable that the lot of land, the price of which it is sought to put in evidence, is of different size and shape from the lot taken; nevertheless, the court may properly exclude evidence of the price paid for similar land in close proximity to the land taken if the lot sold is much smaller than the land in controversy. A large piece of land cannot usually be applied profitably to the same uses as a small piece”

The court in *Johnson, supra*, and apparently the writers in *Nichols* are referring to a case in which the condemnee is offering the sale price of a much smaller piece of land as evidence of the value of a larger piece of land which has been condemned. The reasoning behind excluding such evidence is that the smaller piece of land would overstate the comparable value of the larger tract of condemned land. The petitioner would have us believe that the smaller piece of land would, if anything, overstate the value of the condemned land. Clearly, a smaller piece of land does not always overstate the value of a nearby larger tract of land. There are other differences between the two pieces of land here which lead us to conclude that the trial court did not err in its exclusion of petitioner's evidence. The tract of land which petitioner maintains is comparable is only 1/5 the size of the condemned land and has two buildings on it while the condemned land has three buildings. While the trial court only referred to size in excluding petitioner's evidence, this appears to be only a chance remark. There was sufficient dissimilarity to justify the ruling of the trial court.

[2] For its second assignment of error, the petitioner contends the trial court erred in refusing its motion for a jury view. G.S. 1-181.1 provides:

“The judge presiding at the trial of any action or proceeding involving the exercise of the right of eminent domain or the condemnation of real property may, in his discretion, permit the jury to view the property which is the subject of condemnation.”

The petitioner has failed to show any abuse of discretion by the trial court.

[3] Petitioner phrased its third assignment of error as follows:

“Did the court err in its charge to the jury concerning the testimony of interested witnesses when it cautioned the

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jury concerning the interested witnesses and how they should scan the testimony of such witnesses with care and caution, while failing to tell the jury which witnesses, if any, were interested, and thereby leaving the jury to its own speculation as to which witnesses were the interested ones?"

The trial court instructed the jury in part:

"When you come to consider the testimony of an interested witness, I instruct you that you should scan such testimony with care and caution."

In its instructions to the jury, the trial court recounted evidence of *per diem* rates paid petitioner's expert witnesses and the amount of work they had done for condemnors. Since there was no such evidence relating to respondents' expert witnesses, the petitioner concluded that the jury must have taken the court's instructions as referring to his expert witnesses. Furthermore, petitioner argued that the court should have told the jury it was referring to all of the witnesses. We find no merit to this argument. The petitioner should have cross-examined respondents' witnesses on their bias if he wanted to impress this upon the jury. In *Herndon v. Southern R. R. Co.*, 162 N.C. 317, 78 S.E. 287 (1913), at page 318, the court sustained a general instruction on the bias of witnesses by saying:

"This is but an admonition to the jury, and not pointed to any particular witness or party. It applies with equal force to the defendant as to plaintiff, and to all witnesses alike In no sense can the charge quoted be considered as an expression of opinion upon the facts upon the part of the judge, and it is hard to see how it could be prejudicial to one party more than to the other."

Petitioner's third assignment of error is overruled.

[4] Next, petitioner argues it was error for the trial court to tax the costs of respondents' expert witnesses to petitioner since they were not under subpoena. The court's power to tax costs is dependent upon statutory authorization, and G.S. 7A-314 provides that a subpoena is a condition precedent to the taxing of expert witness fees. *State v. Johnson*, 282 N.C. 1, 191 S.E. 2d 641 (1972); *Couch v. Couch*, 18 N.C. App. 108, 196 S.E. 2d 64 (1973).

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[5] Respondents say they are aware of the *Johnson* case, *supra*, and do not argue that their witnesses were subpoenaed. Instead, respondents show that the witness fees were paid out by the court to the appropriate individuals on 2 November 1973. The court ordered payment of the witness fees on 11 October 1973, after the jury returned a verdict favorable to respondents. On 25 October 1973, judgment was entered and petitioner gave notice of appeal. Petitioner obtained proper extensions of time to serve his case on appeal, but he inadvertently failed to obtain an extension of time to docket his case on appeal and had to petition for a writ of certiorari. Respondents argue that the payment of the fees coupled with petitioner's failure to appeal amounts to a waiver or abandonment of petitioner's right to appeal this issue.

Two cases are relevant on this point. North Carolina follows the rule that the waiver of the right to appeal, like most waivers, must be voluntary and intentional. *Luther v. Luther*, 234 N.C. 429, 67 S.E. 2d 345 (1951); *Bank v. Miller*, 184 N.C. 593, 115 S.E. 161 (1922). In *Miller, supra*, at page 597, the court quoted 2 Cyc. Law & Pro., 647, with approval:

“Voluntary payment or performance of a judgment is generally held to be no bar to appeal, or writ of error for its reversal, unless such payment was made by way of compromise and agreement to settle the controversy, or unless the payment or performance of the judgment was under peculiar circumstances which amounted to a confession of its correctness.”

In the case at bar, the petitioner had never, by his actions, confessed the correctness of the order allowing the witness fees. Instead, he was appealing directly to this Court, and the respondents were aware of this. The petition for writ of certiorari was not so unreasonably delayed as to indicate an intentional abandonment of his appeal. In fact, it was filed soon after the original ninety day period for docketing in this Court had expired. Also, it seems advisable for condemnors to pay the amount of a judgment to the clerk of court in order to escape the adversity of G.S. 40-19 which in effect provides that a condemnor's right to take property is lost if the final judgment is not paid within one year. Furthermore, this Court has interpreted G.S. 40-19 to permit the condemnee to withdraw, with the trial court's approval, an amount paid into the court by the condemnor pending appeal. *Public Service Co. v. Lovin*, 9 N.C. App. 709, 177 S.E.

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2d 448 (1970). From the above circumstances, it does not appear that the petitioner has voluntarily or intentionally abandoned his right to appeal the issue of expert witness fees. The burden is on the respondents Weatherman to show that the appeal has been abandoned or waived. *Bank v. Miller, supra*. They have not carried the burden of proof. Therefore, since the original order on the payment of expert witness fees is in error and the petitioner has not abandoned this issue, we vacate the order taxing expert witness fees to the petitioner.

[6] In his fifth and last assignment of error, the petitioner contends it was error for the trial court to award counsel fees to respondents Weatherman on a contingent fee basis. The face of the record reveals that the trial court determined counsel fees by taking one-third of the difference between what the Redevelopment Commission had offered the landowners (\$11,000.00) and the jury verdict (\$25,400.00). G.S. 160-456 (10) (h) (3) gives the trial court authority to include counsel fees as part of the costs, but it only provides for "reasonable counsel fees". A case in point is *Redevelopment Comm. v. Hyder*, 20 N.C. App. 241, 201 S.E. 2d 236 (1973) where this Court said at pages 245 and 246:

"The use by the court in this case of the contingent fee as the sole guide for a determination of reasonable counsel fees when there is no possibility that the attorney fee may go unpaid does not meet the statutory standard. There are numerous factors for consideration in fixing reasonable attorney fees—the kind of case, the value of the properties in question, the complexity of the legal issues, the time and amount involved, fees customarily charged for similar services, the skill and experience of the attorney, the results obtained, whether the fee is fixed or contingent, *all* afford guidance in reaching the amount of a reasonable fee." (Emphasis added.)

The face of the record in this case shows a determination of counsel fees that is almost identical to the trial court's determination in *Hyder, supra*, which was disapproved by this Court. Counsel for respondents makes the same argument of waiver of the right to appeal this issue due to the 2 November 1973 payment of counsel fees ordered by the trial court. There is no waiver to appeal this issue for the same reasons as previously set out.

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- A. In the trial and judgment as it relates to just compensation, we find no error.
- B. The order allowing expert witness fees is vacated.
- C. The order fixing counsel fees is vacated and the matter is remanded for a determination of reasonable counsel fees.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. JOHN ROGERS, JR.

No. 7420SC584

(Filed 2 October 1974)

1. Criminal Law § 75— right to counsel — question by defendant's mother

Question by the sixteen year old defendant's mother as to whether she could get a lawyer for defendant did not constitute a request that interrogation cease until an attorney was present; furthermore, any statement made by defendant's mother with respect to obtaining counsel was made after defendant had confessed and could not affect the admissibility of the confession.

2. Criminal Law § 75— confession — inducements — findings of fact

The evidence supported the trial court's determination that officers did not tell defendant what sentence he might receive if he signed a confession as opposed to the sentence he might receive if he did not sign the confession.

3. Burglary and Unlawful Breakings § 5— breaking or entering — intent to steal — ownership of property

In a prosecution for breaking or entering with intent to steal, there was no fatal variance where the indictment alleged an intent to steal a minibike owned by a corporation and the evidence showed that the minibike was owned by an individual since ownership of the property is immaterial.

4. Criminal Law § 86— cross-examination of defendant — waiver of rights — confession

The trial court did not err in permitting the State to cross-examine defendant concerning portions of a waiver of rights and a confession signed by defendant.

5. Larceny § 8— property not owned as alleged — references in instructions

In a prosecution for larceny of a minibike and currency from a corporation wherein the evidence showed the minibike did not belong to the corporation, defendant was not prejudiced by the court's refer-

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ences to the minibike in recapitulating the evidence where the court instructed the jury that the evidence showed the minibike did not belong to the corporation and that the jury should not consider it in reference to whether the crime of larceny had been committed.

6. Criminal Law § 113— charge on alibi — necessity for request

The trial court is not required to give an instruction on alibi absent a request therefor.

APPEAL by defendant from *Winner, Judge*, 18 March 1974 Session of Superior Court held in UNION County. Heard in the Court of Appeals 4 September 1974.

This is a criminal action wherein the defendant, John Rogers, Jr., and Larry McClendon were charged in a bill of indictment, proper in form, with felonious breaking or entering into a building occupied by Thomas Gas Company, a corporation, with intent to steal and with committing a felonious larceny therein by stealing currency and a minibike. Following presentation of the evidence, the jury returned a verdict of guilty, and the trial judge imposed a sentence of not less than four years nor more than seven years. Defendant appealed.

The State's evidence tended to show that following his arrest for the offenses charged Larry McClendon made statements inculpat- ing the defendant; that defendant was brought to the Union County Sheriff's office by his mother for questioning; that defendant was advised of his constitutional rights and then voluntarily and understandingly signed a written waiver of his right to counsel and that after being told of the incriminating statements by McClendon, the defendant voluntarily and knowingly signed a written confession to the offenses charged.

Defendant's evidence tended to show that he was only 16 years of age at the time; that officers refused to talk with him at all until after he signed a waiver of his right to counsel; that after being told that McClendon had made statements inculpat- ing him, defendant denied any involvement in the offenses charged, but that he finally signed a written confession after two hours of interrogation and after being told the sentence he might receive if he signed a statement prepared by them as opposed to the sentence he might receive if he did not sign the statement. Additional facts necessary for decision are set out in the opinion.

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Attorney General Carson, by Assistant Attorney General Briley, for the State.

Robert L. Huffman for defendant appellant.

MORRIS, Judge.

Defendant contends that the trial court erred in its finding of facts and conclusions of law at the close of voir dire examination and in denying the defendant's objections thereto. After hearing the evidence in the absence of the jury, the trial judge made findings that the defendant was properly warned of his constitutional rights as required by the *Miranda* decision, "that the defendant understood his rights and that he voluntarily and understandingly waived his rights before making the alleged statement; that at no time did his mother say anything in the conference about obtaining him a lawyer prior to the time the statement was made; that at no time prior to the time the statement was made was any promise or threat made to the defendant; and that the statement was freely, understandingly and voluntarily made." On the basis of these findings the trial judge concluded as a matter of law that the statement was admissible in the trial of this action.

[1] Defendant's first argument with respect to this assignment of error is that his mother's statement to the interrogating officers concerning obtaining an attorney for him was a request that the interrogation cease and the failure to cease the interrogation constituted a denial of his constitutional right to counsel. We find defendant's argument unpersuasive.

As the record clearly shows, all the defendant's mother did was ask if she could get him a lawyer. She did not say she was going to retain an attorney to represent her son nor did she instruct the officer to stop the interrogation until an attorney was present.

Under similar circumstances the United States Supreme Court in *Frazier v. Cupp*, 394 U.S. 731, 22 L.Ed. 2d 684, 89 S.Ct. 1420 (1969), could find no denial of the right to counsel. Even if his mother had standing to insist upon or waive defendant's right to counsel, which we do not concede, as in *Frazier* this was but a "passing comment". In any event, the court found that no statement with respect to obtaining counsel was made by defendant's mother prior to defendant's giving a statement. There was sufficient competent evidence to support this find-

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ing, and it is binding on appeal. *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971).

[2] The defendant next argues that his confession of guilt was not made voluntarily in that he only agreed to sign the statement after officers told him what sentence he might receive if he signed the statement prepared by them as opposed to the sentence he might receive if he did not sign the statement. We also conclude that this argument is without merit.

It is well settled in this State that when an officer induces a confession from a suspect by use of hope or fear, such statement is considered involuntary in law and inadmissible into evidence. *State v. Biggs*, 224 N.C. 23, 29 S.E. 2d 121 (1944). Here, however, there is conflicting evidence with regard to whether any promise or threat was made to the defendant prior to the time he signed the confession. The officer, who questioned the defendant, denies such a threat or expression of hope was made. Such a conflict in the testimony on voir dire raises a question of credibility, which is for the determination of the trial court, and its findings of fact supported by competent evidence are conclusive. *State v. Blackmon*, *supra*. We find ample evidence in the record to support the trial judge's findings.

Defendant next contends that the trial court erred in overruling defendant's objections to questions asked of, and the denying of, defendant's motions to strike answers of Officer Mayberry relating to his conference with and statements made to him by the defendant. Defendant's sole basis for objection was that the statement confessing guilt was not voluntarily made. As we have concluded that the findings of the trial judge with regard to the voluntariness of the confession are supported by competent evidence and conclusive on appeal, this assignment of error is overruled.

[3] It also is asserted that the trial court erred in denying defendant's motion to quash the bill of indictment and dismiss that count of the bill of indictment charging defendant with larceny of a minibike because of fatal variance between allegation and proof. In the indictment McClendon and the defendant were charged with larceny of "one Nova-super Sport minibike and approximately six (6) dollars in money . . . of the said Thomas Gas Company". It later developed that the minibike

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was not the property of said corporation, but rather was owned by one Marshall Pete Edwards. We again find no error.

As we pointed out in *State v. Crawford*, 3 N.C. App. 337, 164 S.E. 2d 625 (1968), cert. denied 275 N.C. 138 (1968), it is not incumbent upon the State to establish the ownership of the property which the defendant *intended* to steal, the particular ownership being immaterial. Therefore, the fact the bill of indictment alleges "intent to steal, take and carry away the merchandise, chattels, money, valuable securities and other personal property of the said Thomas Gas Company . . ." when the stolen property actually belonged to Edwards, is not fatal. Furthermore, it is significant that in his charge the trial judge instructed the jury to disregard evidence of the larceny of the minibike. Based on the foregoing authority, the court was correct in not allowing the defendant's motion to quash the bill of indictment.

[4] Defendant next maintains that the court erred in overruling defendant's objections to the State's questions concerning specific portions of the "waiver of rights" and defendant's statement, and the denying of defendant's motions to strike his answers to said questions. The defendant contends this line of questioning constituted harassment and went beyond the limits of legitimate cross-examination since they were purely repetitious.

It has long been the law in North Carolina that "[t]he limits of legitimate cross-examination are largely within the discretion of the trial judge and his ruling thereon will not be held for error in the absence of showing that the verdict was improperly influenced thereby." *State v. McPherson*, 276 N.C. 482, 172 S.E. 2d 50 (1970), [The Court quoting with approval from *State v. Edwards*, 228 N.C. 153, 44 S.E. 2d 725]. Defendant has shown no abuse of discretion and our review of the record discloses none. We conclude that this line of questioning was not improper or prejudicial.

Defendant also contends the trial court erred in denying his motion to dismiss at the close of all the evidence. There was ample evidence for the State to justify submission of the case to the jury. We are of the opinion, and so hold, that the trial court correctly overruled defendant's motion for dismissal.

[5] In his final assignment of error defendant asserts that the trial court erred in charging the jury. Defendant first argues

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it was prejudicial error for the court repeatedly to refer to the minibike in recapitulating the evidence on the larceny count since the State's evidence showed the Thomas Gas Company did not own the minibike as alleged in the indictment. We find no merit in this contention. As defendant admits, in its charge the trial court instructed the jury that "all the evidence shows that the minibike did not belong to that company and, therefore, you are not to consider that in reference to whether this crime was committed." In light of this statement, and in view of the relevancy of the evidence, we find defendant was not prejudiced by the mention of the minibike in the charge. It is well settled in this State that the trial court's charge must be read as a whole. *State v. Lee*, 277 N.C. 205, 176 S.E. 2d 765 (1970). When considered contextually, this charge was not improper.

[6] Defendant next argues that the trial court committed error in failing to charge on alibi. Defendant did not request such a charge but contends he was entitled to the instruction because G.S. 1-180 requires the trial judge to charge the jury on all substantial features of the case arising on the evidence without special request therefor. We again find defendant's argument unpersuasive in light of the recent case of *State v. Hunt*, 283 N.C. 617, 197 S.E. 2d 513 (1973). There the North Carolina Supreme Court held that "the court is not required to give such an instruction unless it is requested by the defendant". In overturning prior decisions affording the defendant an instruction on alibi when there was evidence to support it notwithstanding his failure to request it, Chief Justice Bobbitt noted that the weight of authority supports the principle that "[i]n the absence of a requested instruction, there is no duty upon the trial court to instruct specifically upon the subject of alibi." Accordingly, defendant's final assignment of error is overruled.

No error.

Chief Judge BROCK and Judge MARTIN concur.

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LUTHER GILES v. TRI-STATE ERECTORS AND LIBERTY MUTUAL
INSURANCE COMPANY

No. 7421IC521

(Filed 2 October 1974)

**Master and Servant §§ 72, 93— workmen's compensation — injury to foot
not before Commission — motion to reconsider**

Where claimant stipulated that the issue before the Industrial Commission in a workmen's compensation proceeding was disfigurement and the amount of permanent partial disability of his right arm, plaintiff introduced into evidence statements of a physician with respect to injury to his right foot, plaintiff appealed the award for disfigurement to the Full Commission and stated in his notice of appeal that all other grounds for appeal were waived and abandoned. The Full Commission on its own motion ordered an examination of claimant to determine the amount of additional permanent partial disability to his right arm, and the physician at the subsequent hearing testified with respect to permanent partial disability of claimant's right foot, the question of permanent partial disability of claimant's right foot was not properly before the Commission, and the Commission did not err in the denial of claimant's motion to reconsider for the purpose of making an award for permanent partial disability of claimant's right foot.

APPEAL by plaintiff from final order of the Industrial Commission, filed 21 December 1973. Heard in the Court of Appeals 27 August 1974.

This is a case arising under the North Carolina Workmen's Compensation Act in which an employee was injured on 23 April 1970 when a bar joist dropped on his head. Liability was admitted, and compensation benefits were paid for temporary total disability and for 10% permanent partial disability of the right arm.

On 11 July 1972, a hearing was held before Deputy Commissioner Barbee at which time it was stipulated by the parties that "the issue is disfigurement and the amount of permanent partial disability to the arm". At that hearing it was also stipulated that certain reports from doctors could be received into evidence as "being what the doctors would say if they were called to testify". Among those documents was a report entitled "Return note H9 2 791 12/18/70, GILES, Luther" and a letter to defendant's carrier dated 18 March 1971 both signed by Dr. James R. Urbaniak. The return note, after discussing the amount

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of permanent partial disability assigned to the right upper extremity, contains the following:

"His main complaint today is paresthesias of the plantar aspect of his right foot. He states this has been present since he returned to consciousness following his accident. He apparently made no note of this previously, but examination today does reveal evidence of posterior tibial nerve compression behind the right malleolus. On percussing the nerve, he has sensation shooting out the bottom of his foot of 'pins and needles' type of feeling. On compression of the vascular system just above the malleolus, he has some reproduction of the sensations. He has normal sensation on the plantar aspect of the foot, however. With a tourniquet placed around the calf and inflated to 110 mm produced no symptoms at 2 minutes, but when it was released, he had paresthesias on the plantar aspect of his foot. He has good dorsalis and posterior tibial pulses. There is a very slight amount of swelling in the posterior tibial compartment on the right.

I believe this man has symptoms of a tarsal tunnel syndrome or compression of the posterior tibial nerve secondary to scar in all probability a result of the blow to this region during his accident.

Nerve conduction times are done on the right and left lower posterior tibial nerves across the ankle joint and the right is 5.8 milliseconds latency and the left 6.0 milliseconds latency and these are normal conduction latencies.

I have injected this area with Xylocaine and Cortisone and told him to return to me in about a month and if his symptoms persist, we may consider another block or eventually posterior tibial nerve decompression in this region."

The letter is as follows:

"RE: Luther Giles
Duke No. H9 2 791
C-512-16227

Dear Mr. Parker:

I will try to answer your questions about Mr. Giles' foot. If the surgery is necessary on Mr. Giles' foot, and I hope that it is not, he should have no permanent partial dis-

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ability following surgery. This would amount to decompressing the nerve which is causing his symptoms. However, it is hoped that this will subside following my last injection and quite often subsides without any treatment.

If surgery is necessary, he would have to spend about five days in the hospital and would lose no more than 2 weeks of work and possibly only about 10 days.

In other words, this requires a skin incision about the ankle, freeing up the nerve and application of a dressing about the ankle for about a week. The sutures could be removed in about 10 days."

On 25 July 1972, Deputy Commissioner Barbee filed his award. The Deputy Commissioner, in the award, set out as one of the stipulations of the parties:

"8. That the questions involved in this hearing is (sic) the amount of disfigurement and the increase in permanent partial disability of the plaintiff's right upper extremity."

He awarded \$1,000 for disfigurement to the head and face, \$150 for disfigurement to the body, compensation based on a 15% increase of permanent partial disability to the claimant's right upper extremity, and an attorney's fee of \$700. On 31 July 1972, Commissioner Barbee filed an amendment to the order by which the award for disfigurement to the head was amended to \$2,000 and the attorney fee amended to \$900.50. Claimant, in apt time, filed application for review by the Full Commission. He assigned as error the failure of the Commissioner to describe in detail claimant's disfigurement and the Commissioner's failure to take into consideration, with respect to the disfigurement, "the receding hair of the employee". For those reasons, claimant contended on appeal that the conclusion of law awarding \$2,000 was contrary to the fact and grossly inadequate and the award itself was contrary to the law and the facts. The application for review further stated:

"All grounds for appeal not specifically set forth herein are hereby specifically waived and abandoned except as otherwise provided by law and the rules of the Industrial Commission."

On 15 February 1973, the Full Commission entered an order, which, in essence increased the disfigurement award to \$2,500 and reduced counsel fees to \$500, struck the provisions

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of the order of the Deputy Commissioner with respect to the right upper extremity, ordered that claimant be examined by Dr. Urbaniak "for the purpose of determining what amount of additional permanent partial disability, if any, this physician finds the plaintiff now has with reference to his right upper extremity". The matter was referred, after the taking of Dr. Urbaniak's evidence, back to the Full Commission "for such orders as it may deem appropriate at that time".

On 28 August 1973, the evidence of Dr. Urbaniak was taken before Commissioner Stephenson. At that time on direct examination by counsel for claimant, Dr. Urbaniak stated that in October 1970, when he rated claimant, he did not give him any permanent partial disability of the right foot but did on 25 May 1973 (the date of the examination ordered by the Full Commission) give him 10% disability of the right foot. On cross-examination the doctor stated that "a good portion of his note of December 18, 1970 involved evaluation of this foot problem". This was the evidence introduced at the hearing of 11 July 1972.

On 24 October 1973 the Full Commission entered its order reinstating the award based on "15% increase of permanent partial disability to plaintiff's right upper extremity" and approved an additional \$400 counsel fee.

Claimant excepted to the Commission's failure to find 10% permanent partial disability of the right foot and to make an award based thereon, and on 2 November 1973, claimant, on the same grounds filed a motion to reconsider asking that the Commission make an award for 10% permanent partial disability of the right foot and that the Commission approve attorney fee contract of 25% of award made by claimant with counsel.

The Commission denied the motion as to the award for permanent partial disability of the right foot but allowed it as to counsel fees. Claimant appealed.

John J. Schramm, Jr., for claimant appellant.

No counsel contra.

MORRIS, Judge.

Claimant's sole question on appeal is whether the Industrial Commission erred in failing to make findings of fact based on evidence relating to the issue of permanent partial disability of the claimant's right foot.

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Claimant relies on *Thomason v. Cab Company*, 235 N.C. 602, 70 S.E. 2d 706 (1952), as supporting his position that this matter must be remanded for findings of fact. It is true that the Court held that matters before the Commission must be remanded if the findings of fact are insufficient to enable the Court to determine the rights of the parties. The Court used limiting language, however, which we think is significant and applicable to the situation before us. Justice Ervin, writing for the Court, said:

"If the findings of fact of the Industrial Commission are supported by competent evidence *and are determinative of all the questions at issue in the proceeding*, the court must accept such findings as final truth, and merely determine whether or not they justify the legal conclusions and decision of the commission. (Citations omitted.) But if the findings of fact of the Industrial Commission are insufficient to enable the court to determine the rights of the parties *upon the matters in controversy*, the proceeding must be remanded to the commission for proper findings. (Citations omitted.)" *Op. cit.* at 605. (Emphasis supplied.)

Unquestionably, the Industrial Commission has jurisdiction to determine all questions of compensable injury *which are properly before it*. Here, claimant stipulated at the 11 July 1972 hearing that the issue before the Commission was "disfigurement and the amount of permanent partial disability to the arm". We have to assume that claimant knew and was aware that he intended to introduce into evidence and did introduce into evidence statements of Dr. Urbaniak with respect to the injury to the right foot. When the Hearing Examiner filed his award, claimant did not except to his setting out in the award the stipulation of the parties that "the questions involved in his hearing is (sic) the amount of disfigurement and the increase in permanent partial disability of the plaintiff's right upper extremity". Claimant appealed from the award, and his basis for appeal was that the award for disfigurement was inadequate. He specifically stated in his notice of appeal that all other grounds for appeal were waived and abandoned. The Full Commission entered its order on 15 February 1973 and, on its own motion, ordered an examination of claimant by Dr. Urbaniak for the limited purpose of determining what amount of additional permanent partial disability, if any, claimant had with respect to his upper right extremity. On Dr. Urbaniak's

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evidence, the Commission affirmed the Hearing Examiner's award. Dr. Urbaniak again testified with respect to the right foot. On cross-examination, he readily conceded that a "good portion of his note of December 18, 1970 involved evaluation of this foot problem". The 18 December 1970 note was, of course, written some 20 months prior to the hearing from which claimant appealed and at which he never mentioned any injury to or resulting disability to his right foot. It was not until 2 November 1973 that claimant brought up the alleged injury to claimant's right foot. This was done by way of motion to reconsider asking that the Commission make an award for 10% permanent partial disability of the right foot. This came at a time when all the evidence was in. Employer had had no prior notice of claimant's claim in this respect and had had no opportunity to defend. Under the circumstances, it seems clear to us that claimant's motion was properly denied. It was a too late attempt to do what should have been done some two years or more prior thereto.

Affirmed.

Chief Judge BROCK and Judge MARTIN concur.

JOHN ELLIOTT WOODARD, ADMINISTRATOR OF PEGGY COLEEN
WOODARD v. WALTER CLAY

No. 7418SC590

(Filed 2 October 1974)

1. Automobiles § 57— wrongful death action — excessive speed at intersection

The trial court erred in directing verdict for defendant in a wrongful death action where the evidence would support a jury verdict finding defendant's speed at an intersection and his failure to reduce speed constituted negligence which was one of the proximate causes of the collision.

2. Automobiles § 79— wrongful death action — entering intersection — no contributory negligence as a matter of law

The trial court erred in directing verdict for defendant in a wrongful death action where the evidence would support but not compel a finding that plaintiff's intestate was contributorily negligent in progressing across a highway in front of defendant's oncoming car.

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APPEAL by plaintiff from *Lupton, Judge*, 18 March 1974 Special Session of Superior Court held in GUILFORD County.

This is a civil action to recover damages for wrongful death. Plaintiff's evidence showed the following:

Plaintiff's intestate was killed in a two-car collision which occurred at approximately 6:55 p.m. on 1 October 1972 within the intersection formed by the entrance of Company Mill Road into U. S. Highway 421 at a point a few miles south of Greensboro, N. C. At that point Highway 421 is a four-lane divided highway which runs generally north and south, with two 12-foot-wide paved traffic lanes running north and two 12-foot-wide paved lanes running south, the northbound lanes being separated from the southbound lanes by a 40-foot-wide median. Company Mill Road runs generally east and west and intersects into Highway 421 from the west. At the intersection there is a paved crossover across the median, but Company Mill Road otherwise dead ends into Highway 421 and does not continue eastward. Approaching the intersection from the north on Highway 421, there are, in addition to the two 12-foot-wide southbound traffic lanes, a 12-foot-wide paved exit lane to the right for traffic exiting to the right westward into Company Mill Road and a 12-foot-wide paved exit lane plus a 3-foot-wide emergency strip to the left for traffic turning left into the crossover over the median. Approximately 800 to 900 feet north of the intersection, Southeast School Road intersects into Highway 421 from the east.

On the date of the collision, Highway 421 was still partially under construction, but both the north and southbound lanes on the approximate 800 to 900 foot segment between the point at which Company Mill Road intersects into Highway 421 from the west and the point where Southeast School Road intersects into it from the east were open to the public in order to permit local traffic to move from points on one side of Highway 421 to points on the other. Highway 421 was not open to the public south of its intersection with Company Mill Road, and at the time of the collision there were barricades up across the southbound lanes on 421 just south of the intersection. These barricades consisted of steel "sawhorse" type frames about 3 feet tall with blinking amber lights on top. There were two barricades in the right-hand lane of the two southbound lanes and one on the other side of the southbound lane, with a small opening, about five feet wide, between. The posted speed limit on that

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section of Highway 421 which was open to the public was 55 miles per hour.

Company Mill Road is a two-lane paved road which intersects into the west side of Highway 421 at approximately a right angle. At the intersection there were two stop signs facing traffic moving eastward on Company Mill Road. One of these was on a traffic island in the middle of the road at a point 8 to 10 feet west of the western edge of Highway 421. The other was on the shoulder at the southwestern corner of the intersection, about 6 feet west of the western edge of Highway 421. From a point about 20 feet west of the traffic island in the center of Company Mill Road, there is no obstruction and you can see north on Highway 421 all the way to the top of the hill on Southeast School Road.

The collision occurred during daylight. The weather was clear and the pavement was dry. Plaintiff's intestate, driving her husband's car with her three children as passengers, approached the intersection driving eastward on Company Mill Road. She stopped at the stop signs and then moved slowly forward into the intersection. At that moment defendant was approaching the intersection, driving his car south on Highway 421. When the Woodard car reached a point approximately at the center of the intersection of the eastbound lane on Company Mill Road with the outside southbound lane on Highway 421, it was struck on its left side by the front of defendant's car. Defendant's car came to rest, facing east and at a point approximately 30 feet south of the intersection, having severe damage to its front. The Woodard car came to rest, turned over on its top and at a point 20 to 25 feet beyond defendant's car, having severe damage to its left side. After it came to rest, there was a barricade underneath the Woodard car, with its amber light still flashing.

Starting almost in the center line of the southbound lanes of Highway 421 and leading up to the point of impact, there were 78 feet of skid marks left by defendant's car. Beyond the point of impact there were an additional 23 feet of skid marks left by defendant's vehicle.

Plaintiff's 13-year-old son, who was a passenger in the right front seat of the Woodard car, testified that he saw defendant's vehicle just prior to the collision, and it was "going pretty fast." Defendant told the investigating highway patrolman that he was running approximately 50 miles per hour.

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At the close of plaintiff's evidence, the court allowed defendant's motion for a directed verdict under Rule 50. From this ruling, plaintiff appeals.

Parker & Mazzoli by Gerald C. Parker for plaintiff appellant.

Frazier, Frazier, Mahler & Walker by Harold C. Mahler and Spencer W. White for defendant appellee.

PARKER, Judge.

Defendant's motion for a directed verdict was made on two grounds, first, that the evidence failed to show actionable negligence on his part, and, second, that the evidence showed contributory negligence on the part of plaintiff's intestate as a matter of law. It cannot be sustained on either.

[1] As to the first ground, there was evidence from which the jury could find that immediately south of the intersection the southbound lanes in which defendant was traveling were closed to the public, that he was put on notice of this fact by the presence of barricades, that though these were so positioned that they did not physically block his continued passage through the intersection, they nevertheless served as a warning of a special hazard which defendant failed to heed. Although there was no evidence that defendant exceeded the posted speed limit, he was under a duty to drive at a speed no greater than was "reasonable and prudent under the conditions then existing." G.S. 20-141(a). Defendant told the officer that he was running approximately 50 miles per hour, and the jury could find that this was greater than was reasonable and prudent under the circumstances. The jury could also find that his failure to reduce speed as he neared the intersection did not conform to the standard of due care of a reasonably prudent person. Thus, the evidence would support a jury verdict finding defendant's speed and his failure to reduce speed constituted negligence which was one of the proximate causes of the collision.

[2] As to the second ground, there was evidence which would support, but which in our opinion would not compel, a verdict finding plaintiff's intestate guilty of contributory negligence. She brought her car to a stop as required by the stop signs facing her at the entrance of Company Mill Road into the west side of Highway 421. At that point she had a clear view up the highway to her left in the direction from which defendant

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was approaching. In the exercise of due care she should have seen defendant's oncoming car. However, she could also observe the barricades in the southbound lanes of the highway to her right, and the jury could find that she knew that the highway to her right was not open to the public. The jury could also find that a prudent person, situated as she was, might in the exercise of due care have reasonably believed that defendant also saw the barricades and that in response to them he intended to drive only where he had a legal right to go. At what exact instant in time defendant's continued approach with speed unabated should have put Mrs. Woodard on notice that he did not intend to observe the barricades, and whether at that instant she still could have taken steps to protect herself and her children, were questions for the jury to decide. The jury might well find that her entrance into and her continued progress across the highway in front of defendant's oncoming car was negligence on her part. On this issue the burden was on the defendant, and we hold only that the evidence did not compel a finding in his favor as a matter of law.

The judgment allowing defendant's motion for a directed verdict is

Reversed.

Judges CAMPBELL and VAUGHN concur.

FIELDCREST MILLS, INC. v. J. HOWARD COBLE, SECRETARY OF REVENUE FOR THE STATE OF NORTH CAROLINA

No. 7417SC552

(Filed 2 October 1974)

Taxation § 29— merger of parent and subsidiary — carry-over of loss — continuity of business enterprise

Where a wholly-owned subsidiary was merged into its parent corporation, the subsidiary had assets of \$1,767,999 at the time of the merger, and the subsidiary conducted a different type of business than that conducted by the parent, there was no continuity of business enterprise and the surviving corporation was not entitled under G.S. 105-130.8 to carry forward and deduct from its income taxes a net economic loss incurred during the preceding year by the subsidiary since the parent corporation has been altered, enlarged and materially affected by the merger.

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APPEAL by plaintiff from *Winner, Special Judge*, 4 February 1974 Civil Session, ROCKINGHAM Superior Court. Heard in the Court of Appeals 27 August 1974.

Plaintiff instituted this action pursuant to G.S. 105-267 for the refund of corporation income taxes for the taxable year 1970 paid by the plaintiff to the defendant. The plaintiff claimed a deduction on its North Carolina income tax return for the year 1970 of \$485,164 by reason of the net economic loss incurred by a wholly-owned subsidiary of the plaintiff, Foremost Screen Print, Inc., (Screen Print) in 1969. Screen Print was merged into the plaintiff on 31 December 1969. The Secretary of Revenue disallowed the tax deduction and assessed the deficiency which now forms the basis for the plaintiff's cause of action.

The plaintiff is a manufacturer of household textile products. Some of these products are printed with various designs. Screen Print was organized by the plaintiff in 1962 for the principal purpose of printing textile products manufactured by the plaintiff.

At the time of the organization of Screen Print, the plaintiff owned all 1600 issued and outstanding shares of voting preferred stock and 400 of the 800 issued and outstanding shares of common stock. On 10 March 1967, the plaintiff acquired the remaining shares of outstanding common stock.

Screen Print has at all pertinent times been engaged in the screen printing of textile products and in the year 1969 did approximately 63% of its business with the plaintiff. In 1969, Screen Print incurred a net economic loss of \$485,164.

The total assets of Screen Print, at the time of the merger, amounted to \$1,767,999 with a net value of \$1,221,337. After the merger, the former Screen Print was operated at the same location with the same employees and in substantially the same manner as before.

Upon an adverse judgment by the trial judge upholding the assessment of the deficiency, the plaintiff appeals.

Attorney General Robert Morgan by Assistant Attorney General George W. Boylan for the defendant appellee.

Womble, Carlyle, Sandridge & Rice by John L. W. Garrou for plaintiff appellant.

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CAMPBELL, Judge.

The plaintiff contends, pursuant to G.S. 105-130.8, that following the merger of Screen Print, a wholly-owned subsidiary, into its parent, Fieldcrest Mills, Inc., the surviving corporation (Fieldcrest) can carry forward and deduct a net economic loss incurred during the preceding year by the subsidiary, (Screen Print). The plaintiff relies in its argument for allowing the deduction on the continuity of business enterprise test as defined in federal and North Carolina cases.

As the plaintiff has pointed out in its brief, the continuity of business enterprise test as espoused in *Libson Shops, Inc. v. Koehler*, 353 U.S. 382, 1 L.Ed. 2d 924, 77 S.Ct. 990 (1957), was referred to by our Supreme Court in *Distributors v. Currie*, 251 N.C. 120, 126, 110 S.E. 2d 880, 884 (1959), to-wit: "The decision in the *Koehler* case rests on a lack of 'continuity of business enterprise.' This expression has a definite and well defined meaning. There is continuity of business enterprise when the income producing business has not been altered, enlarged or materially affected *by the merger*." The court thereafter cited two cases as illustrative of the application of the test. From the nature of the cases cited, it is clear that North Carolina adopts a strict line in allowing the carry-over of net economic loss to other corporate entities. In one case, a shell corporation was formed in another state into which a manufacturing company with net economic losses was merged. In the other, a holding company was formed to avert financial disaster, a manufacturing company being merged into it. In both cases, the surviving corporation was allowed to carry forward net economic losses of the merged manufacturing company because there was no change in business, only a change in name.

In *Distributors v. Currie*, *supra*, there were three corporations engaged in the same business—the sale and distribution of Bibles, books and literature. All three were eventually merged, the surviving corporation having the same shareholders owning stock in the same proportions as they had owned it in the three corporations prior to the merger. The court held this did not constitute continuity of business enterprise under the test as applied in merger cases. See also *Poultry Industries v. Clayton*, 9 N.C. App. 345, 176 S.E. 2d 367, *cert. denied*, 277 N.C. 351 (1970).

The plaintiff seeks to distinguish *Distributors v. Currie*, *supra*, and similar cases on the ground that the merger of a

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wholly-owned subsidiary into its parent is not the same as the merger of corporations which are commonly owned by the same shareholders. This distinction is presumably supported on the basis that the "enterprise," as referred to in the continuity test, encompasses a parent-subsidary group as an entire group. However, the test as defined in *Distributors v. Currie*, *supra*, is in terms of alteration, enlargement, etc. of the income-producing business. The court, in speaking of the holding company situation referred to above, said, "If it had owned any business or property other than the stock and obligations of the (constituent corporation), there would be reason for denying to the corporation resulting from the merger the right to deduct such loss from its income." (Parentheses ours.)" *Distributors v. Currie*, *supra*, at 127, quoting *Cotton Mills v. Commissioner of Internal Revenue*, 61 F. 2d 291, 294 (4th Cir. 1932). Then further, referring to the facts of *Distributors v. Currie*, *supra*, at 127, the court said: "By virtue of the merger a larger and more expanded business came into being and included all of the former income producing businesses. There was no continuity of the business of either of the constituent corporations. By reason of the merger a new and more extensive enterprise has emerged. This new enterprise did not suffer the loss and cannot claim a deduction therefor."

The "enterprise" under the North Carolina view of the business continuity test would be expanded by plaintiff's view and is not in accord with the test applied in North Carolina. A parent-subsidary scheme of ownership does not aid the plaintiff in the carry-over of net economic loss under G.S. 105-130.8.

In *Manufacturing Co. v. Clayton*, 265 N.C. 165, 143 S.E. 2d 113 (1965), there was a merger of a wholly-owned subsidiary into its parent. The issue was whether the gain realized by the parent, though unrecognized under G.S. 105-144(c) would nevertheless be offset against the parent's net economic loss thereby eliminating the ability of the parent to carry forward its losses into succeeding years. In holding that the gain would offset net economic losses of the parent, the court said as follows:

"It seems clear that the nonrecognition principle embodied in G.S. 105-144(c) was to permit a corporation to simplify its corporate structure, and to relieve a parent corporation from tax liability liquidation gains realized in a particular year as a result of corporate liquidation. However, the instant case on the precise basic question . . . does

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not involve taxation of liquidation gains or the public policy embodied in G.S. 105-144(c). The . . . case is concerned with the application of the net economic losses provisions of G.S. 105-147(9)(d) [now covered by G.S. 105-130.8], and the only pertinent public policy considerations are those which underlie this particular section of the statute." *Manufacturing Co. v. Clayton*, *supra*, at 170.

The court construed the *gain* realized on the liquidation as coming under the provision of G.S. 105-147(9)(d)(2), to-wit, that "net economic loss . . . shall mean the amount by which allowable deductions for the year . . . shall exceed income from all sources in the year including any income not taxable under this article." (Emphasis added.) The provision is in substance the same as present G.S. 105-130.8(2). The emphasized portion of the statute covered the *gain* realized on the liquidation even though it went unrecognized under the liquidation provision. There is no similar language allowing a carry-over for *losses* from collateral sources in G.S. 105-130.8.

"The General Assembly was under no constitutional or other legal compulsion to permit a net economic loss or losses deduction It enacted the carry-over provisions . . . 'purely as a matter of grace, gratuitously conferring a benefit' *Rubber Co. v. Shaw, Comr. of Revenue*, 244 N.C. 170, 92 S.E. 2d 799." *Manufacturing Co. v. Clayton*, *supra*, at 171.

Plaintiff's reliance on the federal cases dealing with parent-subsidiary mergers in the "F" reorganization type context is unfounded. The policy of not taxing gains in the liquidation setting is similar to that in the reorganization setting under G.S. 105-145(c) and has nothing to do with the policy concerning net economic loss carry-over under G.S. 105-130.8. See generally *Manufacturing Co. v. Clayton*, *supra*.

G.S. 105-130.8 allows carry-over of net economic losses sustained by a corporation. The purpose of such wording is that of "granting some measure of relief to the corporation which has incurred economic misfortune" G.S. 105-130.8(1) (emphasis added). The import of G.S. 105-130.8 and the North Carolina cases interpreting it is that unless there is continuity of business enterprise in the narrow sense that it has been defined, the corporation claiming the economic loss is not "the" corporation suffering the loss as contemplated by the statute. When the income producing business has been altered, enlarged

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or materially affected, there is no continuity of business enterprise.

In the context of this case, Fieldcrest, Inc., the parent, merged its wholly-owned subsidiary, Screen Print, into it. By virtue of this merger, Fieldcrest, Inc., received total assets valued at \$1,767,999 and a business in which prior to the merger, Fieldcrest, Inc., as a corporation, was not engaged. The business of Fieldcrest, Inc., has been altered, enlarged, and materially affected. As a consequence, it may not carry forward the losses of its merged subsidiary.

In our opinion, the case should be affirmed.

Affirmed.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. MACK EDWARD JONES

No. 7419SC670

(Filed 2 October 1974)

1. Homicide § 26— second degree murder — instructions — proximate cause — foreseeability

It was not necessary for the court to instruct on foreseeability as an element of proximate cause in a prosecution for second degree murder of defendant's wife by shooting her with a pistol.

2. Criminal Law § 45— experimental evidence — admissibility

In a second degree murder prosecution, the fact that defendant contended he was grabbing for the death weapon as it fell toward the floor and that he was not sure it hit anything when it fired did not render inadmissible experimental evidence that the weapon would not fire by being dropped onto a board from various heights unless the grip safety was depressed.

3. Criminal Law § 45— experimental evidence — admissibility

Experimental evidence showing that a pistol would not fire by being dropped unless the grip safety was depressed was not inadmissible on the ground there was no evidence that the pistol was in substantially the same condition as of the day it was used in a killing where the pistol was in working order and was tested less than three weeks after the shooting, a chain of custody was established whereupon the pistol was delivered to a firearms expert, and there was testimony that no one before the expert tested the weapon so as to alter

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its condition; nor was such evidence rendered inadmissible by the fact it contained eight cartridges on the day of the shooting but only one primed cartridge during the testing.

4. Homicide § 21— intent to kill — sufficiency of evidence

In this prosecution for second degree murder, there was sufficient evidence of the circumstances to submit the case to the jury on the question of defendant's intent to kill.

5. Homicide § 30— submission of lesser offense — harmless error

In a prosecution for second degree murder, submission to the jury of an issue of voluntary manslaughter, if erroneous, was not prejudicial to defendant.

APPEAL by defendant from *Crissman, Judge*, April 1974 Criminal Session of Superior Court held in CABARRUS County. Heard in the Court of Appeals 5 September 1974.

Defendant was charged in an indictment with first-degree murder of his wife on 17 July 1971. He was placed on trial for second-degree murder or any lesser included offense. The defendant pleaded not guilty.

The victim was killed by a bullet which entered her chest thirteen and one-half inches from the top of her head and exited her back sixteen and one-half inches from the top of her head. The defendant called the sheriff's office to inform them that he had shot his wife. The victim was found in the bathroom sitting on the toilet and was dead. The spent bullet was found on the floor of the bathroom. The pistol was the defendant's and was found lying on a table in the den. The pistol was a .32-caliber automatic which was turned over to a firearms expert seventeen days after the shooting on 17 July 1971. The expert found the weapon to have two safety devices, a thumb lever safety and a grip safety. The latter type safety must be depressed while the trigger is pulled in order to fire the weapon. The expert performed some tests and experiments on the weapon to determine whether the pistol would fire without simultaneous depression of the grip safety.

He performed two tests, one with the grip safety untaped and one with it taped down. In the former test, he dropped the pistol from six inches, twelve inches on up through forty-two inches onto its handle landing on a piece of wood. In each case the weapon failed to fire. In the taped grip test, the weapon fired when it was dropped from eighteen inches. These tests were performed twice. There was one primed bullet in the car-

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tridge case in each of the tests. The expert testified that the pressure of a normal grip would release the grip safety on the pistol; that when the pressure was released, the safety would spring back out; and that, consequently, if the gun were dropped on a protrusion, it would depress the safety. The expert also admitted that if the pistol were being grabbed about the handle at the moment it hit the floor, that it could discharge a round. All of this evidence was admitted over the defendant's objection.

The defendant testified that he had gone to use the bathroom; that he was carrying a pistol in his pocket because he had had some trouble with robberies; that he removed the pistol from his pocket to use the toilet; that then his wife came in to use the toilet and he stayed for a few moments to talk with her while she used it; that they began a discussion; that he had the pistol either in his left hand or left pocket at that time; that he switched the pistol to his right hand and spun the pistol over on his finger; that he dropped it and that while grabbing at it as it was on the floor or right at the floor level, it discharged hitting his wife.

Further witnesses were offered by the defendant for the purpose of corroborating him in his claim that the pistol discharged by accident. His 13-year-old son testified that he saw his father while standing in the hall to the bathroom twirling the gun and that it fell; and as his father grabbed for it, it went off. The jury returned a verdict of murder in the second degree whereupon the defendant was sentenced to not less than 25 nor more than 30 years in the State Prison.

The defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General T. Buie Costen for the State.

Clarence E. Horton, Jr., for the defendant appellant.

CAMPBELL, Judge.

This is the second time this case has been before us. It appears the first time in 19 N.C. App. 395, 198 S.E. 2d 744 (1973).

[1] The defendant first contends that the triar court erred in its definition of proximate cause in its charge to the jury for that the element of foreseeability was omitted.

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In this case, the defendant was indicted for first-degree murder and was tried and found guilty of murder in the second degree. The jury found the defendant guilty of unlawfully and intentionally killing his wife with malice. Foreseeability was irrelevant in this criminal case involving a killing by shooting with a firearm.

Next the defendant contends that the trial court erred in admitting evidence of certain experiments with the death weapon. He specifically argues that there was no evidence that the pistol was in substantially the same condition as on the day of the killing; that the firearms expert could not testify as to whether the pistol was mechanically damaged; that the pistol had only the primed bullet in it rather than a clip of eight as was established at trial and that the expert only dropped the pistol onto a board which is not a similar condition as compared to defendant's testimony that he was grabbing at it and was not sure it hit anything.

"When the experiment is carried out under substantially similar circumstances to those which surrounded the original transaction, and in such a manner as to shed light on that transaction, the results may be received in evidence Whether the circumstances and conditions are sufficiently similar . . . is of course a preliminary question for the court, and unless too wide of the mark, the ruling thereon will be upheld on appeal." *State v. Phillips*, 228 N.C. 595, 598, 46 S.E. 2d 720, 722 (1948). If the experimental evidence contributes to the end of finding the truth of the matter in question, it should be admitted. 22A C.J.S., Criminal Law, § 645(1), p. 519. The measure of variation allowed between circumstances surrounding the original transaction and that of the experiment is generally tested by the tendency of the variation to confuse the jury. See *State v. Phillips*, *supra*.

[2] The purpose of submitting the results of the tests in this case was manifest, to-wit, that a pistol with a grip-type safety is so constructed that it will not discharge upon being dropped on its handle from various heights. This merely showed the jury that the pistol would not fire by being dropped unless the grip safety was depressed. It did not rule out the possibility as brought out on cross-examination, that the defendant could have grabbed the gun simultaneously with it striking the floor and have it fire. The fact that the defendant contends he was grabbing at the pistol as it fell does not render the test evidence

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inadmissible. The variation was brought out and was not such that it would confuse the jury.

[3] The other contentions of the defendant relating to the experiments were also without merit. A chain of custody was established whereupon the gun was finally delivered to the fire-arms expert. There was testimony that no one before the expert tested the weapon so as to alter its condition. The expert personally fired the pistol prior to the tests to match ballistics with the death bullet. The pistol was in working order and was tested less than three weeks after the shooting. Further, the fact that the pistol had eight cartridges in it on the day of the shooting and only one primed cartridge in it during the testing is not such a variation that it would destroy the utility of the test and confuse the jury. "The want of exact similarity would not perforce exclude the evidence, but would go to its weight" *State v. Phillips, supra*, at 598, 46 S.E. 2d 722. There was no abuse of discretion here in allowing the State to introduce this evidence.

[4] The defendant contends that the trial court erred in failing to dismiss the case as of nonsuit. In a motion for nonsuit, the trial judge is required to consider the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference to be drawn therefrom. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971). The defendant contends that there was not enough evidence of "intent" to prove second-degree murder. "Intent," however, is a mental emotion or attitude which is seldom capable of direct proof and which must ordinarily be proven by circumstances from which it may be inferred. *State v. Arnold*, 264 N.C. 348, 141 S.E. 2d 473 (1965). These circumstances must be weighed and considered by a jury. There was sufficient evidence of the circumstances to submit the case to the jury on the question of the defendant's intent to kill.

[5] The defendant's last contention of error was that the trial judge erred in charging the jury on the offense of voluntary manslaughter. It was argued that there was no evidence of "heat of passion" to support such a charge. This is without merit and, at most, harmless error and not prejudicial to the defendant.

We find no prejudicial error.

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Affirmed.

Judges PARKER and VAUGHN concur.

FRED J. STANBACK, JR. v. VANITA B. STANBACK

No. 7419SC585

(Filed 2 October 1974)

1. Courts § 14; Divorce and Alimony § 22— motion to modify child custody and support order — transfer to district court

The superior court erred in the denial of plaintiff's motion to transfer to the district court pursuant to G.S. 7A-258 a motion to modify a child custody and support order entered in an action pending in the superior court prior to the establishment of the district court.

2. Divorce and Alimony § 22; Rules of Civil Procedure § 31— interrogatory — general health — unnecessary information

In an action to modify a child custody and support order, the trial court properly sustained defendant's objection to an interrogatory requesting her to describe her general health, including conversation or consultation with any medical doctor, psychiatrist or psychologist during the past five years, and including copies of any notes, memoranda or reports in her possession or available to her, since there is nothing in the pleadings to indicate the health of defendant would be in question, and the interrogatory is too broad and seeks information not necessary for any adjudication.

3. Divorce and Alimony § 22— modification of child custody and support order — production of checking records

In an action to modify a child custody and support order, the trial court erred in the allowance of defendant's motion that plaintiff be required to produce all his check stubs, cancelled checks and bank statements for the preceding five years where plaintiff has never failed to comply with previous support orders and there was nothing to indicate that plaintiff will refuse to comply with such orders in the future.

4. Divorce and Alimony § 22— modification of child custody and support order — means to defray hearing preparation expenses

In an action to modify a child custody and support order, the evidence did not support the court's finding that defendant mother had insufficient means to defray the expense of the proceeding, and the court erred in requiring plaintiff to pay to defendant's attorneys \$2,000 to be used for expenses in preparation for the hearing, where the record shows that plaintiff is paying \$500 per month for the support of three minor children and is paying all medical, dental and educational expenses of the children, and that plaintiff is paying

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in excess of \$15,000 per year for the support of defendant and has furnished her with a home free of indebtedness.

APPEAL by plaintiff from various orders entered by *Judges Exum and Crissman* at various sessions of the Superior Court held in ROWAN and RANDOLPH Counties. Heard in the Court of Appeals on 6 September 1974.

This action was originally instituted 30 March 1965, by the plaintiff-husband seeking a divorce from bed and board and custody of two minor children. Both children are boys with the oldest having been born 1 April 1959 and the other born 25 August 1960. After the institution of the action, a third son was born on 29 June 1965. Various hearings, orders and trials were conducted in the action, a review of which is not necessary for the purposes of this decision. The history of the case appears in opinions of the Supreme Court of North Carolina reported in 266 N.C. 72, 145 S.E. 2d 332 (1965) and 270 N.C. 497, 155 S.E. 2d 221 (1967). Subsequent to the last Supreme Court decision and prior to a final court determination of the divorce and alimony controversy, the husband and wife entered into a separation agreement thereby effectively terminating the matrimonial controversy and leaving only the custody of the three minor children and their support in question.

At the March 1968 Civil Session of Superior Court of Rowan County, Judge Exum entered an order pertaining to the custody and support of the three minor children. This order was actually signed 9 May 1968, and filed on 10 May 1968, and specifically provided that the cause was retained for such other and further orders as from time to time the court might deem appropriate.

The action remained in this status until 5 September 1973 when the defendant-wife and mother filed a motion to modify the previous order because of a change in conditions and circumstances, including the fact that the plaintiff-husband was planning to remarry and did, in fact, remarry prior to 27 September 1973.

Since the reopening and reactivating of this action, there have been numerous motions, interrogatories, and orders which have resulted in this appeal and which will be discussed, insofar as pertinent, in the opinion.

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Hudson, Petree, Stockton, Stockton and Robinson by Norwood Robinson and George L. Little, Jr.; and Kluttz and Hamlin by Clarence Kluttz for plaintiff appellant.

Walser, Brinkley, Walser and McGirt by Walter F. Brinkley for defendant appellee.

CAMPBELL, Judge.

At the outset, we are confronted with the question as to whether the various rulings by the trial court are appealable. In view of the long history of litigation between the parties and in the interest of bringing the matter to trial on its merits and under the supervisory authority of this Court, we have determined to consider the various issues presented.

[1] The first issue presented is what court division of the General Court of Justice is the proper one? This action was instituted prior to the "Judicial Department Act of 1965". Under that Act, G.S. 7A-244 provides:

"The district court division is the proper division without regard to the amount in controversy, for the trial of civil actions and proceedings for annulment, divorce, alimony, child support, and child custody."

See also G.S. 50-13.5(h).

Nothing else appearing, the district court division would be the proper division for the hearing of this matter. This action, however, having been instituted in the superior court division, the superior court division would retain jurisdiction until such time as the case was transferred upon motion properly made.

Since this action was pending prior to the establishment of the district court, it could have been transferred to the district court by any superior court judge pursuant to G.S. 7A-259(b). This was not done. The case was in a dormant state and had been since the March 1968 session of the superior court. When this action was reactivated by the motion of 5 September 1973, we are of the opinion, and so hold, that the plaintiff had the right to make a motion to transfer the action to the district court division pursuant to G.S. 7A-258. The plaintiff did make such a motion on 21 September 1973. This motion was denied by order of Judge Exum on 17 October 1973, for that he treated it as a matter within his discretion rather than as a matter of right to the plaintiff. In this, we think there was error.

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[2] The second issue presented is an order of Judge Crissman, 13 January 1974, in which order the objection of the defendant in answering Interrogatory No. 36 submitted by the plaintiff was sustained. The interrogatory in question requested the defendant to describe her general health, including each conversation or consultation with any physician, medical doctor, psychiatrist or psychologist concerning her health or well-being during the past five years, together with copies of any notes, memoranda or reports in her possession or which are available to her. The plaintiff asserts that he is entitled to this information because the general health of the mother is an important circumstance to take into consideration with regard to custody of children. We would agree with this as a general proposition; but in the instant case, there is nothing in the pleadings to indicate that the health of the mother would be in question. In addition to this, we think the interrogatory is entirely too broad and seeks information that would not be necessary for any adjudication. We think the order of Judge Crissman sustaining the objection to this interrogatory correct.

[3] The third issue presented involves an order of Judge Exum dated 27 March 1974, which order was based upon a motion made by the defendant to require the plaintiff to produce certain records. The order directs the plaintiff to "produce all of his check stubs and bank statements for any account maintained by him in any bank and all of the cancelled checks drawn by him on any bank account during the period from 1 March 1968, to date, in order that counsel for the defendant may examine said items and make copies of any of said items which may be desired." The record in this case reveals that over the years the plaintiff has never failed to comply with any court order fixing the amount of any award. Neither is there any indication that the plaintiff will, in the future, refuse to comply with any court order fixing an award. In view of this, we are of the opinion that the order in question goes too far and beyond any requirement which would be necessary for any adjudication. We think the order of Judge Exum is erroneous and it is reversed.

[4] The fourth issue presented is the motion of the defendant to require the plaintiff to furnish the sum of \$2,000 to pay for expenses in connection with the preparation for the hearing. In an order dated 27 March 1974 filed 10 April 1974, Judge Exum ordered the plaintiff to pay the attorneys for the defendant a sum of \$2,000 to be spent by them for reasonable and

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necessary expenses incurred in preparation for the hearing. In this order, Judge Exum found as a fact, "The defendant has insufficient means to defray the expense of this proceeding and the plaintiff maintains a substantial advantage in this litigation unless the defendant has available for her use the necessary funds required to prepare her case." The record discloses, however, that the plaintiff is paying the defendant the sum of \$500 per month for the maintenance and support of the three minor children and in addition thereto is paying all hospital, medical, dental and educational expenses of the children. He is also paying the sum of \$15,144 per year for the support of the defendant individually and has furnished her with a home free of indebtedness. We think the evidence does not support the finding of fact that the defendant has insufficient means to defray the expense of this proceeding; and we, therefore, reverse the order by Judge Exum requiring the payment of this item of \$2,000.

The fifth and last issue presented involves an order of Judge Crissman filed 10 May 1974, dismissing the appeal of the plaintiff. We find it unnecessary to discuss the various elements involving this order and suffice it to say that if the notice of appeal was late, we, nevertheless, as indicated in the beginning of this opinion, have seen fit to consider the appeal on its merits and if necessary will treat the matter as though a writ of certiorari had been granted.

This cause is remanded to the Superior Court of Rowan County with direction that the same be transferred to the District Court of Rowan County for further proceedings not inconsistent with this opinion.

Remanded.

Judges PARKER and VAUGHN concur.

JAMES N. GOLDING v. TOM F. TAYLOR

No. 7428SC723

(Filed 2 October 1974)

1. Evidence § 24; Rules of Civil Procedure § 26— admissibility of deposition

A deposition was properly admitted in evidence where the court found that the witness resided more than 75 miles from the place of trial and was ill and could not attend court.

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2. Evidence § 24— deposition — opportunity of new attorneys to prepare

The trial court did not err in the admission of a deposition on the ground that the attorney first representing defendant had withdrawn from the case and his present attorneys had been employed just before the deposition was taken and had not had sufficient opportunity to prepare for it where no effort was made to procure a continuance of the taking of the deposition or to reopen the deposition for further cross-examination of the deponent.

3. Evidence § 12; Husband and Wife §§ 6, 25— alienation of affections — divorced spouse — competency to testify as to adultery

A divorced spouse may testify as to her adultery with defendant in an action for alienation of her affections brought by her former husband.

4. Husband and Wife § 25— alienation of affections — evidence of claims of other conquests

In an action for alienation of affections of plaintiff's wife, the trial court properly admitted evidence as to defendant's claims of other extramrimonial conquests.

5. Trial § 11— closing argument — introduction of affidavit

Defendant's introduction into evidence of an affidavit constituted the putting on of evidence by defendant and entitled plaintiff to the opening and closing arguments to the jury.

6. Trial § 33— application of law to evidence — stipulation

No stipulation of counsel can relieve the trial judge of the requirement that he instruct the jury as to sufficient evidence to apply the law thereto.

7. Trial § 33— court's statement that it would not apply law to evidence —absence of prejudice

Defendant was not prejudiced by the court's remark in its instructions that counsel had agreed that the court need not review portions of the evidence sufficient to apply the law to the evidence where the court actually did review enough of the evidence to apply the law thereto.

APPEAL by defendant from *McLean, Judge*, 1 April 1974 Civil Session of BUNCOMBE Superior Court. Heard in the Court of Appeals 25 September 1974.

This was an action for alienation of affections of plaintiff's wife, Marian N. Golding.

The record discloses that plaintiff and Marian N. Golding were married to each other on 19 December 1959; had three children born to the marriage, two girls and one boy; the family enjoyed a happy home relationship until the year 1971. In the early part of the year 1971, the defendant commenced a delib-

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erate plan to take the plaintiff's wife. In the summer of 1971 the defendant frequented the swimming pool at the Asheville Country Club where he knew Marian Golding would be present and made it a point to associate with her on these occasions and likewise on other occasions. The defendant showed many niceties to Marian Golding for the purpose of attracting her attention and winning her favor. The defendant prided himself on being quite a lothario. The defendant was quite successful in his conquest of Marian Golding. In August 1971, the defendant had carried his quest of Marian Golding to the point where they began to have trysts in the countryside in the afternoons. From the trysts in the countryside the defendant and Marian Golding progressed to taking trips together until May 1972, when Marian Golding left her family and went to Atlanta, Georgia, to live with the defendant. The marriage of the Goldings was terminated by an absolute divorce in 1973.

Issues were submitted and answered by the jury as follows:

"1. Did the defendant alienate the affections of the plaintiff's wife as alleged in the Complaint?

ANSWER: Yes.

2. What amount, if any, is the plaintiff entitled to recover of the defendant as compensatory damages?

ANSWER: \$45,000.00.

3. Was the plaintiff injured and damaged by the willful, wanton or malicious acts of the defendant as alleged in the Complaint?

ANSWER: Yes.

4. What amount, if any, is the plaintiff entitled to recover of the defendant as punitive damages?

ANSWER: \$25,000.00."

Upon the jury verdict, judgment was entered that the plaintiff have and recover of the defendant the sum of \$70,000.00, together with the cost of the action to be taxed by the Clerk, and the defendant appealed.

Morris, Golding, Blue & Phillips by William C. Morris, Jr., for plaintiff appellee.

Pope and Brown for defendant appellant.

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CAMPBELL, Judge.

Another phase of this case was before this Court and is reported in 19 N.C. App. 245, 198 S.E. 2d 478 (1973). Numerous questions were presented to this Court on behalf of the defendant seeking to establish prejudicial error in the trial. We will take these questions up not necessarily in the order in which they were presented.

[1, 2] The deposition of Marian N. Golding taken 18 January 1974, was offered in evidence. Before the introduction of the deposition, the court found that the witness, Marian N. Golding, resided in Charlotte, North Carolina, which was more than 75 miles from Asheville where the court was sitting and that on the date the deposition was offered, Marian N. Golding was ill and could not attend court on the first and second days of April 1974. The order making these findings was not reduced to writing and incorporated into the record until 4 April 1974, although this order was dated 1 April 1974, and undoubtedly was a *nunc pro tunc* order. The defendant further asserts that the deposition should not have been introduced in evidence for that the attorney first representing the defendant had withdrawn from the case because of a conflict of interest, and his present attorneys had been employed just shortly before the taking of the deposition and therefore had not had sufficient opportunity to prepare for the taking of the deposition. No effort, however, was made to procure a continuance of the taking of the deposition and no effort was made to reopen the deposition for further cross-examination of the deponent. We find no merit in this exception.

[3] The defendant next asserts that Marian N. Golding in the deposition was permitted to testify as to her adultery with the defendant. While Marian N. Golding did not specifically testify as to any acts of adultery, she did testify to associating with and living with the defendant under such circumstances as to make adultery an obvious episode. At the time Marian N. Golding was giving such testimony, she was no longer the wife of the plaintiff.

The Golding marriage was dissolved by an absolute divorce in 1973. The deposition was taken 18 January 1974, and at that time she was no longer the wife of the plaintiff. Furthermore, this was not an action between husband and wife *inter se* as in *Wright v. Wright*, 281 N.C. 159, 188 S.E. 2d 317 (1972). We

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think that under the circumstances of this case a divorced spouse may testify and that the weight of authority as well as of reason favors the view that an absolute divorce places the former spouses in the same position with respect to competency as witnesses as though there had been no marriage, and that each may testify for or against the other even as to matters which occurred or came to his or her knowledge during the existence of the marriage relation, unless such matters are in the nature of confidential communications. See, *State v. Alford*, 274 N.C. 125, 161 S.E. 2d 575 (1968).

Having held that the testimony of Marian N. Golding was competent, it follows that the testimony of corroborating witnesses would likewise be competent, and therefore those exceptions are denied.

[4] The defendant assigns as error the admission of evidence as to defendant's claims of other extramatrimonial conquests. We do not think this evidence was objectionable, and it was relevant to the issues involved in this case. This evidence tended to show the defendant's propensities for this type of activity and his endeavor to be another Casanova.

[5] The defendant assigns as error that the trial court held that the defendant had introduced evidence and therefore was not entitled to the last jury argument. There is no merit in this contention for the record shows that the defendant introduced into evidence as an exhibit an affidavit of 13 September 1972, made by Marian N. Golding. The introduction of that exhibit constituted putting on evidence by the defendant and consequently the plaintiff was entitled to the opening and closing arguments to the jury. *State v. Knight*, 261 N.C. 17, 134 S.E. 2d 101 (1964).

[6, 7] The defendant assigns as error the failure of the court to review the facts of the case and explain the law arising thereon. In support of this assignment of error the defendant relies on an exception to the following portion of the charge shown in parentheses:

"The law requires the presiding judge to review with you the portions of the evidence sufficient to apply the law to the evidence, (but counsel have agreed that the court need not do that in this case, so that will to some extent shorten my instructions to you)."

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The first portion of that sentence taken from the charge, which is not included in the parenthetical portion, is a correct statement of the law; and no stipulation of counsel can relieve the trial judge of the requirement to instruct the jury as to sufficient evidence to apply the law thereto. There is no requirement that the trial judge recapitulate all of the evidence in a trial. It is sufficient if he reviews only so much evidence as may be necessary to apply the law thereto rather than permit the jury to flounder on an uncharted sea. This remark of the trial judge *per se* was not prejudicial to the defendant. It is therefore doubtful if the defendant has taken an exception in the record which would support the assignment of error. Nevertheless, we have reviewed the court's instructions to the jury; and we find that contrary to what Judge McLean stated, he nevertheless did review enough of the evidence to give a framework upon which to apply the law in the case. The jury was not left with a series of legal precepts unconnected with the evidence in the case so that they were left adrift on an uncharted sea. We think when the charge is read in its entirety, the jury was adequately and fully instructed as to their duties so that they could apply the law to the case.

There were other assignments of error which we have considered but do not think it necessary to review in detail.

We think the case was tried free of prejudicial error.

No error.

Judges PARKER and VAUGHN concur.

IN THE MATTER OF: THE LAST WILL AND TESTAMENT AND
FIRST CODICIL OF SALLIE B. ASHLEY

No. 7421SC710

(Filed 2 October 1974)

1. Wills § 16— standing to caveat

The only persons with standing to caveat a will are persons either entitled under such will or interested in the estate. G.S. 31-32.

2. Wills § 16— caveator — pecuniary interest required

Under a statute which permits the contest of wills by persons interested or claiming to be interested in decedent's estate, the general

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rule is that a contestant must have some pecuniary or beneficial interest in the estate that is detrimentally affected by the will.

3. Wills § 16— no pecuniary interest by caveators

Caveators who were nieces, nephews, grandnieces and grandnephews of testatrix did not have a pecuniary interest in deceased's estate where they did not contest the validity of the will which devised and bequeathed property to the North Carolina Baptist Homes, Inc., but they did contest a codicil which revoked the provisions of the Baptist Homes and instead gave the property to four nieces and one nephew.

4. Wills § 13— caveat — in rem proceeding — parties determined by statute

A caveat is an *in rem* proceeding with parties being limited classes of persons specified by the statute who are given the right to participate in the determination of probate of testamentary script; it is for the trial judge to determine who fits the statutory description.

APPEAL by caveators from *McConnell, Judge*, 14 May 1974 Session of Superior Court held in FORSYTH County. Heard in the Court of Appeals on 29 August 1974.

On 28 August 1973, paper writings, dated 25 November 1964 and 28 April 1972 respectively, purporting to be the Last Will and Testament and First Codicil of said Will of Sallie B. Ashley, were admitted to probate in common form in the office of the Clerk of Superior Court of Forsyth County. On 5 October 1973, the caveators, nieces, nephews, grandnieces and grandnephews of the testatrix, filed this proceeding to caveat said Will and First Codicil. The caveators alleged that the said purported Will and First Codicil were not signed by Sallie B. Ashley; that they were not executed in accordance with the law, that her purported signatures were obtained by fraud and duress, that the Will and Codicil were obtained by undue influence, and that Sallie B. Ashley lacked mental capacity to make the Will and First Codicil.

The caveators further alleged that "their rights will be affected to their prejudice by the probate of said instruments as the Last Will and Testament and First Codicil."

In the paper writing dated 25 November 1964, purporting to be her Last Will and Testament, Sallie B. Ashley, after providing for the payment of all her debts, funeral expenses, the costs of the administration of her estate, and after making specific bequests to Swaim's Baptist Church in Yadkin County and Clemmons Baptist Church, Clemmons, North Carolina, de-

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vised and bequeathed by Article IV of said Will, "all the rest of my property, both real and personal, of every sort, kind and description which is not necessary to carry out the provisions of the foregoing Articles of this Will, to the NORTH CAROLINA BAPTIST HOMES, INC., absolutely and in fee simple."

Article V of the purported Will reads as follows:

"I make the foregoing disposition of my property to charitable institutions not because I do not feel affection for my blood relatives, but because I feel that they are well cared for. I feel that the uses to which my property will be put will do the greatest good for the greatest number."

In the paper writing dated 28 April 1972 purporting to be a First Codicil to her Last Will and Testament, Sallie B. Ashley undertook to revoke Articles IV and V of her Will and, in lieu thereof, provide the following:

"ARTICLE IV. I do hereby devise and bequeath all the rest and remainder of my property not necessary to satisfy the provisions of ARTICLES I through III of my said will to my nieces, MRS. FRED (BEULAH) SHOAF; MRS. JAMES (LULA) WHITE; MRS. ZENO (CHARLIE MAE) BROWN; and MRS. LEE ROY (MARY NELL) REAVIS, and to my nephew, FRED HUTCHENS, all of Forsyth County, North Carolina, share and share alike. If any of my said nieces or my nephew pre-deceases me, then I desire that the share which she or he would have taken under the provisions of this paragraph go to his surviving issue. If any of my said nieces or my nephew dies without surviving issue, then I desire that the share which such predeceasing niece and nephew would have taken be divided equally among those of my said nieces and nephew who do survive me, or their surviving issue, share and share alike.

ARTICLE V. By not leaving any of my property to my other nieces and nephews I do not mean to imply any lack of love or affection for them, but the ones I have named in my will have been close to me and most helpful to me. For that reason I choose to remember them in this fashion."

On 14 May 1974, the North Carolina Baptist Homes, Inc., filed a response to the caveat wherein it denied the material allegations of the caveat insofar as it related to the validity of

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the Will, admitted the allegations insofar as the caveat related to the validity of the First Codicil, and prayed:

"1. That the Last Will and Testament of the said Sallie B. Ashley, dated November 25, 1964, be declared a good and valid Will, and the same probated as by law provided;

2. That the Codicil to the Last Will and Testament of the said Sallie B. Ashley, dated April 28, 1972, be declared invalid."

When this proceeding came on for trial in the superior court, the caveators entered the following stipulation:

"It is stipulated that the caveators do not contest the execution or the genuineness of the 1964 will and do not contend that the same was procured by fraud, undue influence, or otherwise, and make no contention with respect to the mental capacity of the testator in 1964.

And with respect to the 1972 codicil, do not contend that the same was not signed according to law, but do contend that it was procured by undue influence and do contend that Sallie Ashley did not have testamentary capacity as of April 28, 1972."

After the caveators had entered the foregoing stipulation, the propounders made a motion that the caveators be dismissed as parties to this proceeding. The trial judge allowed the motion and entered an order which in pertinent part provides:

"[A]nd it appearing on the face of the pleadings and from the stipulation that the caveators do not have and would not have any pecuniary interest in the estate of Sallie B. Ashley whether they were successful or not successful in their contentions;

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that the caveators . . . are dismissed as parties to this proceeding.

It is further Ordered that this Order is without prejudice to whatever rights may exist as to any other person or corporation which might have a pecuniary interest in the Estate of Sallie B. Ashley. It is further Ordered that this cause is retained for further disposition of all remaining issues."

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The caveators appealed.

Hudson, Petree, Stockton, Stockton & Robinson by J. Robert Elster and Robert J. Lawing for propounder appellees.

White and Crumpler by James G. White and Michael J. Lewis for caveator appellants.

No counsel on appeal for North Carolina Baptist Homes, Inc.

HEDRICK, Judge.

The caveators contend the trial court erred in dismissing them as parties to this proceeding.

G.S. 31-32 in pertinent part provides:

“§ 31-32. When and by whom caveat filed.—At the time of application for probate of any will, and the probate thereof in common form, or at any time within three years thereafter, any person entitled under such will, *or interested in the estate*, may appear in person or by attorney before the clerk of the superior court and enter a caveat to the probate of such will” (Emphasis added.)

[1] As can be seen from this statute, the only persons with standing to caveat a Will are persons either (1) “entitled under such will” or (2) “interested in the estate”. None of the appellants are named in the Will or Codicil, and they do not contend that they are “entitled” under the Will or Codicil. The crucial question, therefore, is whether they are persons “interested in the estate”.

[2] “Under statutes which permit the contest of wills by persons interested or claiming to be interested in the decedent’s estate, the general rule is that a contestant must have some pecuniary or beneficial interest in the estate of the decedent that is detrimentally affected by the will.” 57 Am. Jur., Wills, § 798, p. 541 (footnotes omitted). In Page on Wills, we find the following:

“An ‘interested person’ or an ‘aggrieved person’ is one who has a direct pecuniary interest in the estate of the alleged testator which will be defeated or impaired if the instrument in question is held to be a valid will.” 3 Page on Wills, § 26.52, p. 118 (footnotes omitted).

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It is well settled that North Carolina follows this generally accepted definition of a person "interested in the estate". See *In re Thompson*, 178 N.C. 540, 101 S.E. 107 (1919).

[3] In the present case, the caveators filed a "broadside" caveat before the Clerk as to both the Will and Codicil and the cause was transferred to the superior court for trial. The position taken by the caveators at that time did allege a pecuniary interest as required by the statute, in that if the Will and Codicil were both invalidated, they would share in the estate as intestate heirs. Prior to trial, however, this position was destroyed by the caveators' own stipulation that they did not contest the validity of the Will, which meant that even if they successfully invalidated the Codicil they still would receive no pecuniary benefit from the estate. By that time, North Carolina Baptist Homes, Inc., had responded in the superior court. It adopted the caveators' position with regard to the Codicil, but it likewise agreed that there was no contest as to the Will. Because of the appearance of North Carolina Baptist Homes, Inc., and the position taken by it, this cause will still have to be submitted to the jury on the issue of *devisavit vel non*.

[4] A caveat is an *in rem* proceeding. The "parties" are not parties in the usual sense but are limited classes of persons specified by the statute who are given a right to participate in the determination of probate of testamentary script. It was for the trial judge to determine what persons fit the statutory description, and it was determined that the appellants did not. See *In re Will of Belvin*, 261 N.C. 275, 134 S.E. 2d 225 (1964); *In re Will of Brock*, 229 N.C. 482, 50 S.E. 2d 555 (1948).

Just because a person files a caveat, he is not thereby vested with permanent standing to participate in the proceedings. The order appealed from is

Affirmed.

Judges BRITT and BALEY concur.

State v. Rice

STATE OF NORTH CAROLINA v. GENE RICE

No. 7417SC719

(Filed 2 October 1974)

1. Criminal Law § 91— motion to continue to obtain witnesses — time of making

By not informing either his counsel or the court until the State and the defendant had presented evidence and rested the case, defendant waived any right to have the proceeding delayed or to compel witnesses to testify as to matters that might corroborate his own testimony.

2. Criminal Law § 91— continuance to secure witnesses — denial proper

There is nothing in the record to indicate that defendant was in any way prejudiced by the court's refusal to delay the trial to compel the attendance of the witnesses or in the use of a stipulation instead of their testimony.

APPEAL by defendant from *Rousseau, Judge*, 26 March 1974 Session of Superior Court held in CASWELL County. Heard in the Court of Appeals on 3 September 1974.

Defendant was charged in a warrant, proper in form, with assaulting one Sergeant Henderson and Mr. Tingen with a deadly weapon.

The record discloses that the defendant waived his right to court-appointed counsel at his trial in the district court. Upon the defendant's conviction and appeal to the superior court for trial *de novo*, Judge Rousseau appointed Robert R. Blackwell to represent him.

Upon the defendant's plea of not guilty, the State offered evidence tending to show that on 29 December 1973 the defendant was an inmate at the Caswell County Prison Unit. On this date, Sergeant Roy Henderson, an officer on the second shift, went to the Unit's dormitory with Mr. Tingen and others for the purpose of transferring the defendant to the "segregation cell block". The defendant refused to leave the dormitory; and when Sergeant Henderson approached, the defendant stated that he would hit Sergeant Henderson with a padlock. The defendant was armed with a padlock welded to a pipe which was attached to an "inmate belt" approximately two feet in length. The padlock weighed approximately one pound. The defendant wrapped the belt around his hand; and when the officers approached, he swung the weapon at Henderson, Dailey, and

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Tingen. The officers were forced to dodge and retreat to avoid being struck by the weapon in the hands of the defendant. One of the blows "struck the cell block door leaving a dent thereon."

The defendant testified and denied that he struck at Henderson or any other officer with the lock.

After the State and the defendant had rested, the record discloses that the following occurred:

"//COURT: Now is there a question about not having witnesses here?

DEFENDANT: Yes, sir, I went to the Clerk's office and Mr. Moore and the Clerk subpoenaed witness[es] for me and so I would like to have them here tomorrow to bring out the truth of this matter.

SOLICITOR SCOTT: The State is willing for the defendant to state what your witnesses would testify to if they were here.

DEFENDANT: That is not going to be exactly the same thing.

COURT: I will allow you to state what those witnesses would state if they were here and read it to the jury tomorrow.//

EXCEPTION[S] 1 and 2 (denoted above with //).

DEFENDANT: You have it in the transcript that you are denying me witnesses to be subpoenaed?

COURT: No, sir.

DEFENDANT: Why weren't you?

COURT: I am saying when the case was called there was nothing said about the witnesses not being present. Let the record show that this case was called for trial, that the jury was empaneled. The State offered its witnesses or witness and the defendant testified in his own behalf and his attorney announced there was no further evidence. The defendant himself then stated that he could not get his witnesses at which time the Court offered to allow him to give the names of his witnesses and the Solicitor has stated that he would stipulate that if those witnesses were

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present that they would testify as to whatever the defendant said they would testify. Now who are your witnesses?

DEFENDANT: Richard Holmes, Charles Carter, the Clerk wrote it down awhile ago; Richard Holmes and Charles Carter and Edward Lewis, Roy Fox, Leinwood Day and James McLamb.

COURT: What would Richard Holmes testify to if he were here?

DEFENDANT: Well, he would testify to the same thing that I had and Charles Carter would testify to the same thing that I did and Edward Lewis would testify to the same thing that I did and the other three would testify * * *

COURT: So the last three would testify about that, would they testify about anything that happened in lockup concerning this case?

A. No, sir.

COURT: I will allow you to read into the record and I want the Reporter to type up that part, what Richard Holmes and Charles Carter and Edward Lewis would testify to if they had been here. And I deny the others.

COURT: Let the record further show this warrant was sworn out on the 28th day of January, 1974. That he was tried in the lower court on March 2[2], 1974, and that he was brought to Caswell County on March 26, 1974. And that three subpoenas were given to the Clerk but that when the case was called for trial there was no mention made of witnesses not being present."

The jury found the defendant guilty; and from a judgment imposing a prison sentence of fifteen months, he appealed.

Attorney General Robert Morgan by Associate Attorney Kenneth B. Oettinger for the State.

Blackwell & Farmer by R. Lee Farmer for defendant appellant.

HEDRICK, Judge.

All of defendant's assignments of error relate to the court's refusal to delay defendant's trial in order to obtain defendant's

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witnesses and in the use of the stipulation that the witnesses, if present, would corroborate defendant's testimony.

Although not denominated as such, we treat the colloquy set out in the record between the defendant and the court as a denial of motions to continue and to reopen the case for the introduction of additional testimony.

It is well settled in this State that a motion to continue is addressed to the sound discretion of the trial judge and his ruling thereon will not be reversed in the absence of a showing of an abuse of discretion. *State v. Moses*, 272 N.C. 509, 158 S.E. 2d 617 (1968); 2 Strong, N. C. Index 2d, Criminal Law, § 91, p. 620. However, if the motion is based on a right guaranteed by the Federal and State Constitutions, the motion presents a question of law and the order of the court is reviewable. *State v. Baldwin*, 276 N.C. 690, 174 S.E. 2d 526 (1970); 2 Strong, N. C. Index 2d, Criminal Law, § 91, p. 620.

A motion to reopen a case to call additional witnesses is likewise addressed to the discretion of the trial judge and absent a showing of abuse will not be reversed on appeal. *State v. Shutt*, 279 N.C. 689, 185 S.E. 2d 206 (1971), cert. denied, 406 U.S. 928 (1972); *State v. Stack*, 12 N.C. App. 101, 182 S.E. 2d 633 (1971); 2 Strong, N. C. Index 2d, Criminal Law, § 97, p. 631.

[1] There is nothing in this record to indicate that the trial court abused its discretion in refusing to delay the defendant's trial in order that the witnesses subpoenaed by the defendant could be brought to court to corroborate the defendant's own testimony. The defendant was tried in the district court four days before his case was called in the superior court. At his trial in the district court, the defendant waived his right to court-appointed counsel. Prior to his trial *de novo* in the superior court, Judge Rousseau appointed counsel to represent him. Had the defendant desired, he could have informed his attorney of his wishes regarding the witnesses in sufficient time to compel their attendance or to move for a continuance until such time as the witnesses could be made available. By not informing either his counsel or the court until the State and the defendant had presented evidence and rested the case, we are of the opinion the defendant waived any right to have the proceedings delayed or to compel witnesses to testify as to matters that might corroborate his own testimony. On this record, no abuse of discretion is shown.

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[2] Furthermore, it is abundantly clear from the record that Judge Rousseau and the Assistant District Attorney went out of their way to accommodate the wishes of the defendant with respect to the desired witnesses. While the defendant complains that the use of the stipulation would not be the same as the personal testimony of the witnesses, he did not object to its use. Indeed, he and his attorney implicitly assented thereto. There is nothing in this record to indicate that the defendant was in any way prejudiced by the court's refusal to delay the trial to compel the attendance of the witnesses or in the use of the stipulation in lieu of their testimony. We do not find that the trial judge either abused his discretion or denied the defendant his constitutional right of confrontation. See *State v. Utley*, 223 N.C. 39, 25 S.E. 2d 195 (1943).

The defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and BAILEY concur.

STATE OF NORTH CAROLINA v. CURTIS MOSES INGRAM

No. 7421SC570

(Filed 2 October 1974)

1. Narcotics § 3— nonexpert opinion testimony — harmless error

Error in the admission of an SBI agent's testimony that the contents of a package "appeared to be heroin" was harmless where an expert witness thereafter testified that the substance was heroin.

2. Constitutional Law § 31— identity of informant

In a prosecution for possession and distribution of heroin, defendant failed to show a sufficient need for an informer's identity on the ground that his testimony was needed on the question of the ability of an SBI agent to see defendant when defendant allegedly passed a package of heroin to another where the person to whom the package was passed testified that he received the package from defendant's hand and defendant introduced photographs of the area where the transaction allegedly occurred.

3. Criminal Law § 101— denial of jury view

The trial court did not err in the denial of defendant's motion for a jury view of the scene where an SBI agent allegedly saw defendant sell heroin to another.

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4. Criminal Law § 85— character evidence — failure to show prejudice

In a prosecution for possession and distribution of heroin wherein defendant's character was not put in issue, defendant failed to show that he was prejudiced by an SBI agent's testimony that he might have come across defendant's name in the intelligence files or by another agent's testimony that he knew defendant through his reputation even if such testimony amounted to evidence of defendant's character.

5. Criminal Law § 162— necessity for motion to strike

When testimony is initially admissible, but its content later shows that it is not admissible, objection thereto must be made by motion to strike the objectionable portion.

APPEAL by defendant from *McConnell, Judge*, 11 February 1974, Criminal Session of Superior Court held in FORSYTH.

Defendant was charged with and convicted of the possession and distribution of heroin.

Agent Gooch of the State Bureau of Investigation testified that upon his arrival in Winston-Salem as an undercover agent to buy drugs, he met another SBI agent, Agent Batten, who introduced him to an informer. The informer and Agent Gooch proceeded to Hiawatha Hairston's residence. Hairston, unaware at the time that Gooch was an undercover agent, rode around with Gooch and the informer to help Gooch purchase drugs. At approximately 11:00 p.m. they arrived at an apartment complex in Winston-Salem, and Hairston left the car to purchase \$300.00 worth of drugs.

Gooch testified that there were no porch lights at the apartment complex, but that there was a nearby street light. The defendant appeared at the door for about ten seconds and handed Hairston an aluminum foil package. Hairston then delivered the package to Gooch who was waiting in the car. At this point Hairston, Gooch, and the informer drove away to meet Agent Batten. Agent Gooch performed a preliminary test on part of the substance purchased which indicated that the substance was heroin. The rest of the substance was turned over to Batten to be analyzed.

In apt time the defendant appealed to this Court from a judgment entered upon an adverse jury verdict.

Attorney General Carson, by Associate Attorney William W. Webb, for the State.

G. Ray Motsinger, for defendant appellant.

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MARTIN, Judge.

[1] Defendant has brought five assignments of error to this Court for consideration. First, he contends that it was reversible error for the trial court to allow Agent Gooch's testimony that the contents of the package he received from Hairston on the night in question "appeared to be heroin". There is no evidence in this record that qualifies Gooch to give such an opinion. However, this error is harmless since an expert witness testified later in the trial that the substance was heroin, and this testimony was not disputed.

[2] Secondly, defendant argues that the court erred in not requiring the State to reveal the identity of the informer who accompanied Gooch and Hairston. Counsel for defendant correctly states the law in this area. The State is not required to disclose the identity of its informer unless the defendant can show a sufficient need. *State v. McLawhorn*, 16 N.C. App. 153, 191 S.E. 2d 410 (1972). Defendant points out that the informer was present at the crucial time when Gooch claims to have seen the defendant pass the package to Hairston. Since the ability of Gooch to see the defendant was an important factor in determining Gooch's credibility, defendant concludes that he had sufficient need of the informer's testimony. The defendant refers us to *Roviaro v. United States*, 353 U.S. 53, 1 L.Ed. 2d 639, 77 S.Ct. 623 (1957). In *Roviaro*, at 1 L.Ed. 2d 639, 646, the U. S. Supreme Court indicates that the public's interest in the nondisclosure of an informer's identity must be balanced against the significance of an informer's testimony. Furthermore, the *Roviaro* court determines the significance of an informer's testimony by reference to all the evidence. The possible impeachment of one state witness does not, by itself, make an informer's testimony significant.

In the case at bar, Hairston testified he received the package from defendant's hand. This testimony renders Gooch's testimony less significant, and in turn, renders the informer's possible testimony less significant. Furthermore, defendant introduced photographs of the area. Looking at the record as a whole, it appears that the defendant has failed to show a sufficient need for the informer's identity. This assignment of error is overruled.

[3] In his third assignment of error, the defendant argues that the trial court abused its discretion by denying defendant's

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motion for a jury view of the scene. Whether a jury view should be granted is in the discretion of the trial court. *State v. Payne*, 280 N.C. 150, 185 S.E. 2d 116 (1971) ; *State v. McGhee*, 16 N.C. App. 702, 193 S.E. 2d 446 (1972). There is nothing here to indicate an abuse of discretion. This assignment of error is overruled.

[4] The fourth assignment of error raises the question of whether it was reversible error for the trial court to overrule defendant's objection to the following testimony by SBI agents in response to the solicitor's questions:

"Q. Now, prior to this night, had you known Curtis Ingram?

A. No sir, I did not. I could have come across his name due to identification work in our Intelligence Agency, but

Mr. Motsinger: Objection.

The Court: You didn't know him you say?

A. No, but I believe I could have come across his name in our Intelligence files.

The Court: Overruled."

Later in the trial the following dialogue took place:

"Q. Had you any knowledge of him (the defendant)?

A. I know him through his reputation.

Mr. Motsinger: Objection.

The Court: What did you say, yes?

A. Yes, sir.

The Court: Overruled."

Defendant argues that the foregoing testimony amounts to evidence of defendant's character when his character was not put in issue. The State contends that the testimony was proper to show the lack of bias on the part of the SBI agents and only incidentally reflected on the defendant's character. If the testimony of the officers had been impeached, it would have been proper for the State to show lack of bias on the part of the witnesses. Generally, a party is not permitted to show lack of bias of his own witness where the opposite party has not attempted to impeach him. 98 C.J.S. Witnesses § 544, p. 486. How-

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ever, the burden is on the defendant to show this Court how this error adversely affected him. 3 Strong, N. C. Index 2d, Criminal Law § 167, page 126. This he has failed to do.

[5] Defendant's last assignment of error refers to the testimony of Agent Batten, in which Batten, on two occasions, relates a description of the defendant which Gooch had given him immediately after the purchase of heroin. The record shows that on one occasion defendant objected to the solicitor's question calling for the description, and on another occasion, the defendant interrupted Batten with an objection as Batten began testifying to Gooch's description of the defendant. It is true that Batten's testimony does not corroborate Gooch and, therefore, becomes inadmissible as hearsay. However, defendant lost the benefit of his objection by failing to move to strike the testimony. When testimony is initially admissible, but its content later shows that it is not admissible, objection thereto must be made by motion to strike the objectionable portion. *State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534 (1970); *State v. McMullin*, 23 N.C. App. 90, 208 S.E. 2d 228 (1974); Stansbury, N. C. Evidence 2d, § 27, at page 51.

We find no reversible error in this case.

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. RAYMOND OTIS PERRY

No. 7415SC683

(Filed 2 October 1974)

1. Criminal Law § 164— denial of motion for nonsuit — consideration on appeal

Defendant cannot contend on appeal that the trial court erred in not allowing his motion for nonsuit made after the State had rested where defendant thereafter took the stand in his own behalf. G.S. 15-173.

2. Parent and Child § 9— nonsupport of child — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for nonsupport of children where defendant testified that he

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was employed, that he had earnings of a specified amount, and that he had paid only slightly more than \$400 for support since 1967.

3. Criminal Law § 97— introduction of additional evidence

So long as defendant has an opportunity to offer evidence in rebuttal, the court has discretion to reopen a case for additional testimony up until the jury returns.

4. Criminal Law § 99— questioning of defendant by court — no expression of opinion

In a prosecution for nonsupport, the trial court did not err in questioning defendant as to when defendant left home, how much he had paid for support since then, whether he sought to see or speak to his children, and what ability defendant had to make support payments.

5. Criminal Law § 169— objection to question — failure to include answer in record

In a prosecution for nonsupport, a question put to the mother of the children concerning a child born prior to her marriage to defendant was not reviewable on appeal since the record did not show what the answer would have been.

6. Criminal Law § 112— reasonable doubt — wilfulness — jury instructions — definition not required

In the absence of a request, the trial judge was not required to define the terms "reasonable doubt" and "wilfulness."

APPEAL by defendant from *Clark, Judge*, 8 April 1974 Criminal Session of ALAMANCE Superior Court. Heard in the Court of Appeals 17 September 1974.

Defendant was charged in a warrant dated 2 November 1973 with unlawful and wilful neglect and refusal to provide adequate support for his two children. The alleged offense took place on or about 20 August 1971. The defendant was tried and found guilty in district court, whereupon he appealed to the superior court for a trial *de novo*.

Maxine Perry, the former wife and the mother of the children, testified that the defendant and she were married in 1961; that they had two children of the marriage; that the defendant and she have not been living together since April 1967; that the defendant was ordered in a civil action in 1967 to pay \$23.00 per week support; that since 1967, the defendant has paid only \$400.00 for child support; that the defendant left leaving an oil bill and a milk bill plus two obligations to finance companies; and that she earns approximately \$55.00 per week after taxes. The State rested and defendant moved for nonsuit as there was no

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evidence of defendant's ability to pay. The State then moved to reopen its case. This was allowed.

The State then examined the former wife concerning the defendant's testimony in the district court trial as to his earnings and ability to pay. The judge allowed this over the defendant's objection. Thereafter, the defendant again made a motion for nonsuit which was denied.

The defendant testified that he left home in 1967; that he sought to see his children on numerous occasions and that one time, at midnight, he was told by Maxine Perry not to come back; that the reason he stopped making payments was because he was not allowed to see his children; that his former wife told him that she did not want his money and has never demanded any; that he remarried in 1970 and has had two children by that marriage, together with a stepson to support; and that he now earns \$120 per week after taxes.

The jury returned a verdict of guilty, and from a sentence of imprisonment, the defendant appealed.

Attorney General James H. Carson, Jr. by Assistant Attorney General Parks H. Icenhour for the State.

David I. Smith for the defendant appellant.

CAMPBELL, Judge.

[1] The defendant contends that the trial court erred in not allowing the defendant's motion for nonsuit after the State had rested and in then allowing the State to reopen its case and introduce evidence of statements made by the defendant at the district court trial.

After the State rested and the motion for nonsuit was denied, the defendant took the stand in his own behalf. "If the defendant introduces evidence, he thereby waives any motion for dismissal . . . which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal." G.S. 15-173. Consequently, the defendant cannot assert the denial of that motion on appeal.

[2] So far as the motion for nonsuit after the defendant's evidence is concerned, that motion was properly denied. The defendant testified that he was employed; that he had earnings of a specified amount and that he had paid only slightly more than

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\$400 for support since 1967. There was sufficient evidence on each element of the offense charged to submit the case to the jury.

[3] The defendant's contention that there was error in allowing the State to reopen its case is without merit. So long as the defendant has an opportunity to offer evidence in rebuttal, the court has discretion to reopen a case for additional testimony up until the jury retires, *State v. Anderson*, 281 N.C. 261, 188 S.E. 2d 336 (1972), and has even been held to have such discretion after the jury has begun its deliberation. *State v. Thompson*, 19 N.C. App. 693, 200 S.E. 2d 208 (1973).

The defendant contends there was error in allowing Mrs. Perry to testify as to what the defendant had said regarding his employment and earnings in the district court. This was not error.

[4] The defendant next asserts that the trial court made sufficient errors in the trial and charge so as to deny the defendant a fair and impartial trial free from prejudicial error. Basically, this contention is in the first part directed toward a number of questions asked by the court during the State's presentation of its case. Our review discloses that the court asked questions dealing with when the defendant left home, how much he had paid for support since then, whether he sought to see or speak to his children, and what ability the defendant had to make support payments. The defendant contends that questions directed to the defendant's ability to earn, etc., in 1967 and succeeding years are irrelevant because the time on the warrant reads "on or about the 20th day of August 1971." This is untenable. The defendant was charged under G.S. 14-322 which specifically states that "such wilful neglect . . . shall constitute a continuing offense . . ." Such questions therefore are relevant to the issues to be tried. They clarified the testimony elicited, and promoted a better understanding of it. We have examined the questions propounded by the trial court and find no resulting prejudice or expression of opinion in violation of G.S. 1-180.

[5] Another alleged error was the refusal by the trial court to allow the defendant to ask questions of Mrs. Perry concerning a child born prior to her marriage with the defendant for the purpose of impeaching her. This was not error and furthermore the question is not properly reviewable since what the answer to the question would have been is not in the record. See *State v. Kirby*, 276 N.C. 123, 171 S.E. 2d 416 (1970).

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The defendant contends that there was prejudicial error committed in the charge to the jury because of comments made concerning "abandonment". In the portion to which the defendant refers, the trial judge was summarizing a contention of the State that the jury "should find the defendant intentionally left his wife and two children" This contention was directed to the issue of wilful neglect and is not such that it would be prejudicial to the defendant.

[6] The defendant further argues that the trial judge erred in failing to charge the jury on the questions of "reasonable doubt" and "wilfulness". "[T]rial judges are not required to define the term 'beyond a reasonable doubt' in charging the jury in criminal cases." *State v. Broome*, 268 N.C. 298, 299, 150 S.E. 2d 416, 417 (1966). The defendant did not request such an instruction and did not object to its absence until after the jury retired. In like manner, the defendant did not request an instruction defining "wilfulness". Without a request, the trial judge was under no obligation to define it. These words are as nearly self-explanatory as any explanation that can be made of them. Consequently, the defendant was not prejudiced.

Having considered the various assignments of error, we conclude that there was no error.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOHNNY REID

No. 7421SC502

(Filed 2 October 1974)

1. Searches and Seizures § 4— search warrant for service station — search of vehicle proper

Where a warrant gave officers authority to search a service station and surrounding premises but it made no mention of defendant's vehicle, search of the vehicle which was parked on the service station lot was authorized and not unreasonable.

2. Searches and Seizures § 1— suspected contraband in plain view — warrantless search proper

Having observed vials of pills and capsules in plain view on the dashboard of the defendant's vehicle, which vials they reasonably sus-

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pected contained controlled substances, officers could reasonably conclude that the vehicle contained other contraband which justified a complete search of the vehicle.

3. Intoxicating Liquor § 12— testimony as to firearm — no prejudice

In a prosecution for the unlawful possession of taxpaid liquor for the purpose of sale, defendant failed to show that the admission of testimony pertaining to a Rossi firearm found within defendant's car substantially prejudiced him or that the verdict of the jury was influenced thereby.

4. Criminal Law § 58— signature on insurance policy — evidence not prejudicial

The trial court did not err in allowing testimony as to the signature on an assigned risk automobile insurance policy, though there was no evidence of the witness's familiarity with defendant's handwriting, since the State did not attempt to prove by the witness that the writing was defendant's signature.

5. Criminal Law § 77— ownership of vehicle — admission by defendant

Admission of defendant to an arresting officer that a car containing one gallon of taxpaid liquor for sale was his was sufficient to show ownership of the vehicle in defendant.

6. Criminal Law § 112— instruction on reasonable doubt

Trial court's use of the word "testimony" instead of the word "evidence" in defining a reasonable doubt did not prejudice defendant.

7. Criminal Law § 114— opinion held by judge — no expression

Trial court's instruction to the jury that he possessed an opinion about the case but it would be highly improper for him to try to convey it to them since they were the exclusive judges of the facts did not prejudice defendant.

8. Intoxicating Liquor § 19— constructive possession of liquor — instructions on intent

Trial court's instruction on intent as an element of constructive possession was proper.

9. Criminal Law § 89— evidence of prior crimes — impeachment

The jury was adequately informed that the State introduced evidence of prior crimes solely for the purpose of impeaching defendant's credibility.

APPEAL by defendant from *Armstrong, Judge*, 19 November 1973 Session of Superior Court held in FORSYTH County. Heard in the Court of Appeals 26 August 1974.

This criminal prosecution is based on a warrant which charges that defendant on or about 17 August 1973 unlawfully and willfully possessed more than one gallon of taxpaid liquor for the purpose of sale in violation of G.S. 18A-7.

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In the Superior Court after trial on his plea of not guilty, defendant was found guilty by the jury and judgment was entered on the verdict imposing a sentence of not less than 12 months and one day nor more than 24 months. Defendant appealed.

Attorney General Carson, by Associate Attorney Wallace, for the State.

Harrell Powell, Jr., for defendant appellant.

MORRIS, Judge.

[1] Defendant first contends that the trial court erred in allowing the evidence, pills and pints of whiskey, that was seized from the search of a 1970 Pontiac, to be entered in that said search was illegal.

The automobile was parked in the lot of a service station of which defendant was night manager. The search warrant gave the officers authority to search the premises but did not specifically refer to the automobile.

Although we find no North Carolina appellate court decision which has addressed itself to the question of whether the search of a vehicle not mentioned in the warrant is permissible, various other states have held that where the warrant designates the building on the premises to be searched, a search of a motor vehicle parked near the building and on the same premises is not an unreasonable search. 79 C.J.S., Searches and Seizures, § 83, p. 903. In *Massey v. Commonwealth*, 305 S.W. 2d 755 (1957), a search of a vehicle parked at the rear door of the premises being searched was upheld. On the same day, the Court of Appeals of Kentucky held that if a search warrant validly describes the premises, a vehicle found thereon may be searched even though the warrant contains no description of the vehicle. *McCissell v. Commonwealth*, 305 S.W. 2d 756 (1957). In *Lawson v. State*, 176 Tenn. 457, 143 S.W. 2d 716 (1940), where the vehicle was owned by the person mentioned in the warrant and the vehicle was within the boundaries of the premises being searched, a search of the vehicle was upheld.

A number of cases have upheld the search of a vehicle on the premises where the search warrant authorized a search of a building and "outbuildings," or "the yard and outhouses," or the building "together with all outbuildings, places, and premises

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used or connected therewith." *Bowdry v. State*, 82 Okl. Cr. 119, 166 P. 2d 1018 (1946); *Alexander v. State*, 108 So. 2d 308 (1959); *Lindley v. State*, 294 P. 2d 851 (1956). Similarly a search of a vehicle on the premises has been upheld where the search warrant directed officers to search "specific realty and curtilage and appurtenances." *Leslie v. State*, 294 P. 2d 854 (1956).

Although the search warrant in this case does not specifically refer to all outbuildings, appurtenances, etc., it does refer to the affidavit upon which the search warrant was issued and incorporates the description of the premises contained therein. This description refers to "a small one-room gray metal out building . . . approximately 15-feet . . ." from the service station. Thus it seems clear that the warrant authorized a search not only of the service station building itself, but also the surrounding premises. Consequently, a search of defendant's vehicle, which was on the premises at the time and within the area encompassed by the search warrant, was authorized and not unreasonable.

[2] The fact that the officers observed vials of pills and capsules on the dashboard of defendant's vehicle also provided grounds for a search of the vehicle. Probable cause for a warrantless search of an automobile exists if there is "a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction . . ." *U. S. v. Moody*, 485 F. 2d 531 (3d Cir. 1973). Having observed vials of pills and capsules in plain view on the dashboard of the defendant's vehicle, which vials they reasonably suspected contained controlled substances, the officers here could reasonably conclude the vehicle contained other contraband which justified a complete search of the vehicle.

[3] Defendant next contends that the trial court erred in allowing Officer Wilson to testify as to any evidence pertaining to a Rossi firearm found within the defendant's car. Defendant argues that this testimony was irrelevant and prejudicial.

The State apparently concedes this testimony was irrelevant in that it had no logical tendency to prove any fact in issue and that it was error to admit such testimony. The State, however, contends that the defendant was not substantially prejudiced by this testimony.

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"Not every erroneous ruling on the admissibility of evidence will result in a new trial being ordered. When the reviewing court is convinced that justice has been done and that evidence which was excluded would not, if admitted, have changed the result of the trial, a new trial will not be granted. So also where evidence has been improperly admitted, 'The burden is on the appellant not only to show error but to enable the Court to see that he was prejudiced or the verdict of the jury probably influenced thereby.'" Stansbury, N. C. Evidence 2d, § 9, (Brandis Rev. 1973).

After a careful review of the record we are convinced that justice has been done in this case and that the admission of testimony regarding the Rossi firearm did not affect the outcome of this case. The defendant has failed to show that the admission of such testimony substantially prejudiced him or that the verdict of the jury was influenced thereby.

[4, 5] Defendant's third assignment of error relates to the testimony of Vernon H. Smith, Vice-President of Davis Insurance Company, who testified as to the signature on an assigned risk automobile insurance policy. Defendant contends that in admitting this testimony, the trial court committed error since the witness testified that the signature on the policy was the defendant's signature and there was no showing the witness had seen the defendant sign his name before. From the record, however, we find that the testimony was not that the signature on the policy was defendant's but rather only that the policy was issued to one "Johnny Reid" and that the signature on the policy read "Johnny Reid". The witness specifically stated he did not know whether the signature was that of the defendant, or someone else with the same name, or whether someone else signed the name "Johnny Reid" to the policy. The State did not by this witness attempt to prove that the writing was the defendant's signature, and it was not, therefore, necessary to establish the witness's familiarity with the defendant's handwriting. Defendant also argues that this testimony was essential to show ownership of the car by the defendant and thereby show constructive possession of the liquor within. We find no merit in this contention in light of the fact that one of the arresting officers testified the defendant admitted the car was his. This was sufficient to show ownership of the car in the defendant.

[6] The defendant's fourth assignment of error charges that the trial court erred in its instruction to the jury in that the

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trial judge used the word "testimony" instead of the word "evidence" in defining "a reasonable doubt". According to defendant, this led the jury to consider only oral testimony in determining whether there was reasonable doubt, instead of all of the evidence. The jury could not have been misled in this case nor was defendant prejudiced in any way. The charge, taken as a whole, was fully understandable and left no doubt as to what the jury should, or should not, consider in arriving at its verdict.

[7] Defendant next contends the trial judge erred in instructing the jury by stating that he possessed an opinion about the case, although it would be highly improper for him to try to convey it to them since they were the exclusive judges of the facts. Defendant admits that the judge did not directly express his opinion but contends that the comment by the judge implied that he believed the State had proved its case.

It is well settled in this State that unless it appears with ordinary certainty that the rights of either party have been in some way prejudiced by the remark or conduct of the court, it cannot be treated as error. *State v. Browning*, 78 N.C. 555 (1878); *Kanoy v. Hinshaw*, 273 N.C. 418, 160 S.E. 2d 296 (1968). Furthermore, the petitioner has the burden of showing that the judge's remarks constituted prejudicial error. *Davis v. State of North Carolina*, 196 F. Supp. 488 (E.D.N.C. 1961), rev'd and remanded 310 F. 2d 904 (4th Cir. 1962), Hab. corp. denied 221 F. Supp. 494 (E.D.N.C. 1963), aff'd 339 F. 2d 770 (4th Cir. 1964), cert. granted 382 U.S. 953, 86 S.Ct. 439, 15 L.Ed. 2d 358 (1966), rev'd and remanded on other grounds 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed. 2d 895 (1966).

We find no merit in the defendant's contention on these facts. Here, there was no evidence of a direct expression of opinion by the judge and defendant has failed to show any indirect expression of opinion. We conclude the defendant has failed to show that he was prejudiced to any extent by this comment.

[8] Defendant next contends the trial court erred in its instruction as to constructive possession in that the charge did not include intent as an element of constructive possession. An examination of the record shows that the charge, when considered as a whole, sufficiently informed the jury that "intent" was an element which they needed to find present in order to find

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the defendant guilty. When the charge considered contextually adequately presents the law of the case to the jury, the charge is not subject to the objection that it failed to explain the law on a particular aspect of the case. *Lewis v. Barnhill*, 267 N.C. 457, 148 S.E. 2d 536 (1966).

And in *Jackson v. Jones*, 2 N.C. App. 441, 446, 163 S.E. 2d 31 (1968), this Court, quoting from *Vincent v. Woody*, 238 N.C. 118, 76 S.E. 2d 356 (1953), said:

“To require him [the presiding judge] to state every clause and sentence so precisely that even when lifted out of context it expressed the law applicable to the facts in the cause on trial with such exactitude and nicety that it may be held, in and of itself, a correct application of the law of the case would exact of the *nisi prius* judges a task impossible of performance.”

[9] Defendant's final assignment of error also relates to the trial judge's charge to the jury. He contends that the trial judge erred in that he did not instruct the jury while restating the evidence that prior convictions of the same or different crime are admissible solely for the purpose of establishing the credibility of the witness. The jury was adequately informed that the State introduced the evidence solely for the purpose of impeaching defendant's credibility. Previously cited authorities are determinative here.

Taken as a whole, the charge was not improper, and the jury could not have been misled.

No error.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. BARRY LEE CHAPPELL

No. 749SC618

(Filed 2 October 1974)

Constitutional Law § 32— indigent defendant — right to counsel

Defendant is entitled to a new trial where the record shows that the trial court dismissed defendant's court-appointed counsel after a dispute arose between defendant and his counsel, the court continued

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defendant's case so that he could retain his own counsel, defendant was not represented by counsel when his case was called for trial, there was no indication that defendant was ever requested to sign a written waiver of counsel or that if he had been so requested that he would have refused to do so, and defendant was adjudged to be indigent.

APPEAL by defendant from *Webb, Judge*, 21 January 1974 Session of Superior Court held in PERSON County.

On 23 March 1973 defendant was arrested on a warrant charging him with felonious assault. He was found to be indigent and on 29 March 1973 an attorney was appointed to represent him. Following preliminary hearing the District Court on 3 May 1973 found probable cause and bound defendant over for trial in the Superior Court. At the 7 May 1973 Session of Superior Court the grand jury returned as a true bill a bill of indictment charging defendant with felonious assault with a deadly weapon with intent to kill inflicting serious injuries.

The case was scheduled for trial before Judge McLelland at the October 1973 Session of Superior Court, at which time defendant appeared with his court-appointed counsel. A dispute arose between defendant and his counsel, and Judge McLelland relieved the counsel of further duties in the case. Defendant stated in open court that he would have a privately retained counsel to represent him at the January 1974 Session, and Judge McLelland continued the case until that time. No written order was signed by Judge McLelland in this case.

The case was called for trial before Judge Webb at the January 1974 Session of Superior Court, at which time defendant was not represented by counsel. On arraignment defendant pled not guilty to the charge contained in the indictment, and the trial proceeded without defendant being represented by counsel. The trial resulted in a jury verdict finding defendant guilty of assault with a deadly weapon inflicting serious injury. On 23 January 1974 judgment was entered on the verdict sentencing defendant to prison for five years. From this judgment defendant, acting for himself, in open court gave notice of appeal.

On the day the judgment of imprisonment was entered, 23 January 1974, the trial judge, upon defendant's affidavit of indigency, found and adjudged him to be indigent and appointed his present counsel to represent him on this appeal.

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Subsequent to the rendering of the judgment, the trial judge held a hearing relative to defendant's lack of counsel at his trial. Following this hearing, Judge Webb entered an order dated 24 January 1974 making findings of fact on the basis of which he concluded "that the ends of justice would not be served by continuing the case," and ordered that "defendant's motion for continuance be overruled."

Assistant Attorney General Charles M. Hensey for the State.

Alan S. Hicks for defendant appellant.

PARKER, Judge.

G. S. 7A-457(a) is as follows:

"An indigent person who has been informed of his right to be represented by counsel at any in-court proceeding, may, in writing, waive the right to in-court representation by counsel, if the court finds of record that at the time of waiver the indigent person acted with full awareness of his rights and of the consequences of the waiver. In making such a finding, the court shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the crime charged."

In the present case defendant had been duly adjudged to be indigent prior to his preliminary hearing, and on the day of his trial the trial judge again found and adjudged that he was indigent. He did not waive in writing his right to be represented by counsel at his trial, and, indeed, nothing in the record indicates that he orally waived his right to counsel.

It is, of course, true that an indigent defendant is not entitled to have the court appoint counsel of his own choosing, *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652 (1972), and an unfounded dissatisfaction with his court-appointed counsel does not entitle him to the services of another court-appointed attorney. *State v. Moore*, 6 N.C. App. 596, 170 S.E. 2d 568 (1969). It is also true that the court may not force counsel upon an indigent defendant who may elect to represent himself. *State v. Alston*, 272 N.C. 278, 158 S.E. 2d 52 (1967). Here, however, the record makes clear that defendant did not wish to represent himself and did not willingly go to trial without

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counsel. On the contrary, it would appear that he moved for a continuance until he could obtain an attorney.

At the hearing held on the day following his trial, defendant testified that after Judge McLelland told him he would have to pay his own lawyer he consulted an attorney whom he thought would represent him but that he was unable to raise the money to pay the attorney's fee. In the order entered following that hearing, the trial judge made no finding that defendant knowingly elected to represent himself, finding only that "defendant has not retained counsel to represent him, having previously discharged with the consent of the Court his court appointed counsel." On the day preceding the entry of this order, the trial judge had found defendant to be indigent.

We are not here confronted with the situation of an indigent defendant refusing without justification to be represented by competent court-appointed counsel and at the same time refusing to sign a written waiver of counsel. Here, the record does not indicate that defendant was ever requested to sign a written waiver of counsel or that if he had been so requested that he would have refused to do so. Nor was defendant in this case ever given the option knowingly to elect between being represented at trial by the counsel who was originally appointed for him or being tried without any counsel at all.

Under the circumstances of this case it was error to proceed with the trial when defendant was not represented by counsel. Defendant is entitled to a

New trial.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. TONY MINK

No. 7422SC676

(Filed 2 October 1974)

1. Burglary and Unlawful Breakings § 5— accomplice testimony — sufficiency to sustain conviction

In a prosecution for felonious breaking or entering, the trial court properly denied defendant's motion for nonsuit based on defendant's

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contention that testimony of an accomplice was uncorroborated, since the unsupported testimony of an accomplice is sufficient to sustain a conviction if it satisfies the jury beyond a reasonable doubt of defendant's guilt; furthermore, the record is replete with evidence tending to corroborate the testimony of the accomplice in this case.

2. Criminal Law §§ 113, 163— misstatement of evidence in jury charge — correction in trial court required

Misstatement of the testimony of a sheriff by the trial court in instructing the jury was not prejudicial to defendant where such error was not called to the attention of the court during the trial and where similar testimony was given at trial by another witness.

3. Constitutional Law § 33— right of defendant to remain silent

Evidence in a prosecution for felonious breaking and entering as to defendant's silence regarding the fact that a television set and radios were in the automobile occupied by the defendant and two accomplices was properly admitted, since there was nothing to indicate that defendant's silence followed any accusatory statement made by the sheriff.

4. Criminal Law § 165— argument of solicitor — necessity for objection in trial court

Objections to portions of the State's argument to the jury should be made before the case is submitted to the jury; furthermore, control of the argument of the district attorney and counsel rests largely in the discretion of the trial court, and only in extreme cases of abuse where the court fails to intervene or correct an impropriety will a new trial be awarded on appeal.

APPEAL by defendant from *Wood, Judge*, 11 March 1974 Session of Superior Court held in ALEXANDER County. Heard in the Court of Appeals on 29 August 1974.

This is a criminal prosecution on a bill of indictment, proper in form, charging the defendant with felonious breaking or entering.

Upon the defendant's plea of not guilty, the State offered evidence tending to show that on the night of 15 January 1974 the defendant, Jesse Johnson, and David Connor went from North Wilkesboro by way of Taylorsville to Hiddenite, North Carolina, in an automobile driven by the defendant for the purpose of breaking into the Hiddenite Exxon Service Station. When they arrived at the service station, the defendant broke the glass out of the station's front door with a lug wrench he had taken from the automobile. They all entered the service station and removed therefrom several radios, a television set, and a small amount of money from the cash register. Shortly after leaving the service station, with the defendant driving, they

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were stopped by Tom Bebbber, the Sheriff of Alexander County, who seized the radios and television set.

The defendant testified in his own defense. He denied that he had been driving the car and denied that he had participated in any way in the break-in of the service station or the larceny of the radios and television set. Defendant testified that he had been drinking heavily on this occasion and that he went to sleep prior to arriving in Taylorsville and did not wake up until David Connor punched him and said that they were being stopped by the Sheriff.

From a verdict of guilty as charged and from a judgment imposing a prison sentence of ten years, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General George W. Boylan for the State.

Edward L. Hedrick for defendant appellant.

HEDRICK, Judge.

[1] The defendant assigns as error the denial of his motion for nonsuit. The defendant contends "that the court erred in failing to nonsuit the case based on the uncorroborated testimony of an accomplice" The record is replete with evidence tending to corroborate the testimony of the accomplice, Jesse Johnson. Furthermore, the unsupported testimony of an accomplice is sufficient to sustain a conviction if it satisfies the jury beyond a reasonable doubt of the guilt of the defendant. *State v. Tilley*, 239 N.C. 245, 79 S.E. 2d 473 (1954); *State v. Bailey*, 18 N.C. App. 313, 196 S.E. 2d 556 (1973), cert. denied, 283 N.C. 754, 198 S.E. 2d 724 (1973), cert. denied, 415 U.S. 976 (1974). This assignment of error is not sustained.

[2] Defendant also contends that he was prejudiced by the trial court's summary of the testimony of Sheriff Bebbber wherein the court stated that, upon approaching the automobile in which the defendant and his friends had been riding, Bebbber "saw movements and saw Tony Mink and David Connor switch." The court had earlier ruled that the sheriff's statement that there was movement in the front seat "as if somebody was switching drivers" should be stricken. This contention is without merit.

"Slight inadvertencies in recapitulating the evidence or stating contentions must be called to the attention of the court

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in time for correction. Objection after verdict comes too late." *State v. Goines*, 273 N.C. 509, 514, 160 S.E. 2d 469, 472 (1968) (citations omitted). It does not appear that the court's misstatement of the evidence was called to the attention of the trial court during the trial. Furthermore, in view of the fact that Jesse Johnson testified, without objection, that the defendant was driving the car and that he switched places with David Connor when the sheriff stopped them, we are of the opinion that this assignment of error should be overruled.

[3] Defendant, by his third assignment of error, contends the court erred in allowing the assistant district attorney on cross-examination of the defendant to elicit evidence that the defendant made no statement to anyone, and particularly to Sheriff Bebbler, regarding the fact that the television set and radios were in the automobile occupied by the defendant and the two accomplices. The defendant further contends that the court committed prejudicial error in allowing the assistant district attorney to cross-examine David Connor with respect to the defendant's silence.

We recognize the principle that evidence as to the silence of a defendant in the face of an accusatory statement is incompetent when the accused has been taken into custody and police officers are present. *Miranda v. Arizona*, 384 U.S. 436, 468, n. 37 (1966); *Stansbury*, N. C. Evidence, Brandis Revision, Vol. 2, § 179, p. 54. There is nothing, however, in this record to indicate that the sheriff made any accusatory statement to the defendant or any of the accomplices. Moreover, it is clear from the record that the questions objected to were for the purpose of attacking the credibility of the defendant's contention that he had been asleep during the commission of the crime.

[4] Finally, the defendant contends, based on four exceptions noted in the record, that the assistant district attorney made prejudicial and improper statements to the jury which entitle the defendant to a new trial. Procedurally, none of the defendant's objections to the argument of the assistant district attorney is properly before this Court in that the record clearly discloses that such objections were not brought to the attention of the trial court for rulings thereon prior to submission of the case to the jury. Objections to portions of the State's argument to the jury should be made before the case is submitted to the jury. *State v. Peele*, 274 N.C. 106, 161 S.E. 2d 568 (1968), cert. denied, 393 U. S. 1042 (1969). Furthermore, control of the argu-

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ment of the district attorney and counsel rests largely in the discretion of the trial court, and only in extreme cases of abuse where the court fails to intervene or correct an impropriety will a new trial be awarded on appeal. *State v. Smith*, 4 N.C. App. 261, 166 S.E. 2d 473 (1969), cert. denied, 275 N.C. 341 (1969); *State v. Burgess*, 1 N.C. App. 104, 160 S.E. 2d 110 (1968).

We have carefully examined each exception upon which these assignments of error are based and find no impropriety upon the part of the assistant district attorney in his argument to the jury which would warrant the trial judge's intervention. These assignments of error have no merit.

The defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and BALEY concur.

CAROL FLETCHER v. GALE CORVIN FLETCHER, MABEL
FLETCHER LAWSON AND HUSBAND, WILLIAM C. LAWSON

No. 7415SC671

(Filed 2 October 1974)

1. Appeal and Error § 57— nonjury trial — review of trial court's findings

In a nonjury trial the resolution of conflicting evidence is a matter for the court, and when the evidence is sufficient to support the findings and when error of law does not appear upon the face of the record proper, the judgment will not be disturbed on appeal.

2. Husband and Wife § 10— separation agreement signed under duress — ownership of property

In a proceeding for a partition sale of real property, evidence was sufficient to support the trial court's findings that the husband had inflicted violence on the wife, that the husband threatened to kill her if she did not sign a separation agreement by which the husband claimed sole ownership of the real property in question, and that the wife signed the agreement because she was afraid not to sign.

3. Husband and Wife § 10— separation agreement — examination of wife — certificate attacked for fraud

G.S. 52-6 requires that a certifying officer conduct an examination and determine that a separation agreement was voluntarily executed and certify that the agreement is not unreasonable or injurious to

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the wife; the certificate of the officer is conclusive of the facts therein stated, but it may be impeached for fraud.

APPEAL by defendants from *Clark, Judge*, 4 February 1974 Session of Superior Court held in ALAMANCE County.

This is a special proceeding for a partition sale of real property.

Petitioner, Carol Fletcher, alleged that she was formerly married to Gale Corvin Fletcher, respondent; that she and respondent had become owners of an estate by the entireties in certain real property; that respondent had conveyed his interest in said property by deed of trust to secure a purported debt; that she never signed said deed of trust and therefore did not convey her interest in the land; that thereafter she and respondent were divorced; and, that an actual partition cannot be made without injuries to the interested parties.

Respondent answered and, among other things, claimed sole ownership of the real property in question by reason of the provisions of a separation agreement dated 16 March 1971.

Petitioner's reply attacked the validity of the separation agreement, claiming the agreement was not executed in compliance with the formal requirements of law and that the agreement was signed by petitioner under coercion and undue influence exercised upon her by respondent.

Following petition, answer and reply, the Clerk transferred the cause to the civil issue docket of the Superior Court where the case was tried by the Court without a jury.

The issue at trial was whether the separation agreement excluded plaintiff from any interest in the real estate.

The record indicates that respondent offered evidence first, as follows. He and petitioner entered into a separation agreement on 16 March 1971, whereby petitioner conveyed to respondent her interest in the real property in question. Although respondent testified that petitioner signed a quitclaim deed to the property, he admitted that there had been no delivery of the deed. At the time of and prior to its execution, respondent and petitioner had negotiated with respect to the agreement. Respondent engaged the services of an attorney and petitioner elected not to employ an attorney to represent her interest.

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Respondent never mistreated petitioner. He never made a threat on her life and did not threaten to kill petitioner if she did not sign the agreement. Respondent admitted one act of violence on petitioner when petitioner returned home after staying out all night. Respondent slammed a door on her arm, but both parties were at fault. Respondent never interfered with petitioner at the privy examination conducted in the magistrate's office and the examination was conducted as required by statute.

In summary, the thrust of respondent's evidence was that petitioner freely and voluntarily executed the agreement and that the same was not unreasonable or injurious to her.

Petitioner testified in summary as follows. Respondent had inflicted violence on her person and once used a wrench to cut her hand when she was attempting to enter a storm door. Petitioner talked with the respondent's attorney about the separation agreement but only in respondent's presence. Petitioner saw the deed of separation for the first time on 16 March 1971.

When petitioner signed the separation agreement in the magistrate's office, the door was not shut and respondent and his attorney were observing her during the examination. Prior to the time of the signing of the separation agreement by petitioner, respondent had threatened to kill her and make her death look like an accident if she did not sign. She believed respondent and signed the agreement for fear she would be harmed if she refused to do so.

The Court made findings of fact in favor of petitioner which were generally in accord with petitioner's testimony and concluded that the signing of the separation agreement by petitioner was not voluntary and of her own free will but was the result of coercion and duress practiced upon her by respondent. The Court adjudged that the separation agreement was void and petitioner was a tenant in common in the property.

W. R. Dalton, Jr., for plaintiff appellee.

Frederick J. Sternberg for defendant appellants.

VAUGHN, Judge.

[1] In a nonjury trial the resolution of conflicting evidence is a matter for the Court, and when the evidence is sufficient to support the findings and when error of law does not appear

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upon the face of the record proper, the judgment will not be disturbed on appeal. *Wall v. Timberlake*, 272 N.C. 731, 158 S.E. 2d 780. The judge's factual findings, if supported by competent evidence, are as conclusive on appeal as the verdict of a jury. *McMichael v. Borough Motors, Inc.*, 14 N.C. App. 441, 188 S.E. 2d 721. This is the rule notwithstanding that, as here, there is evidence which would sustain contrary findings.

[2] The Court made findings that respondent had inflicted violence on petitioner, that respondent threatened to kill her if she did not sign the separation agreement, and that she signed the agreement because she was afraid not to sign. These and other findings were supported by the petitioner's evidence. The Court was at liberty to disbelieve all of respondent's evidence to the contrary.

[3] G.S. 52-6 establishes statutory requirements for the execution of separation agreements between husband and wife. Among other things, the certifying officer must conduct an examination and determine that the agreement was voluntarily executed, and certify that the agreement is not unreasonable or injurious to the wife. See *Tripp v. Tripp*, 266 N.C. 378, 379, 146 S.E. 2d 507, 508. "The certificate of the officer shall be conclusive to the facts therein stated but may be impeached for fraud as other judgments may be." G.S. 52-6. See *Kiger v. Kiger*, 258 N.C. 126, 128 S.E. 2d 235. The certificate is conclusive except for fraud. *Tripp, supra*, at 379, 146 S.E. 2d, at 508. Duress and undue influence are both a species of fraud. *Joyner v. Joyner*, 264 N.C. 27, 140 S.E. 2d 714. Duress may take the form of unlawfully inducing one to make a contract or to perform some other act against his own free will. It may be manifested by threats or by the exhibition of force which apparently cannot be resisted. See *Smithwick v. Whitley*, 152 N.C. 369, 67 S.E. 913.

The Court's findings of fact, based upon evidence offered by petitioner, supports the Court's conclusions of law, including the conclusions that respondent practiced coercion, undue influence and duress upon petitioner so as to render petitioner's execution of the agreement involuntary. Such coercion amounts to fraud and renders the agreement void and not binding on petitioner.

The judgment from which respondent appealed is affirmed.

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Affirmed.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. LEE DAVIS GATEWOOD

No. 7420SC591

(Filed 2 October 1974)

1. Assault and Battery § 15— self-defense — fault in bringing on difficulty

In a prosecution for felonious assault of a highway patrolman and a passerby who attempted to aid the patrolman, defendant was not entitled to an instruction on self-defense where defendant, by his own testimony, admitted that the difficulty ensued when he opened the door of the patrol car while it was moving slowly after his arrest and that the patrolman thought he was getting out of the car, since defendant was at fault in bringing on the difficulty.

2. Criminal Law § 89— exclusion of corroborative testimony — testimony of corroborated witness not yet given

The trial court did not err in the exclusion of testimony allegedly admissible to corroborate defendant's testimony where defendant had not yet testified at the time the testimony was offered.

3. Robbery § 4— common law robbery — taking of officer's pistol — felonious intent

There was sufficient evidence of felonious intent to support submission to the jury of an offense of common-law robbery of a highway patrolman where the State's evidence tended to show that defendant gained control of the patrolman's pistol during an altercation with the patrolman, that defendant fled the scene with the pistol, and that defendant kept the pistol for two days.

APPEAL by defendant from *Seay, Judge*, 14 January 1974 Session of ANSON County Superior Court. Heard in the Court of Appeals 5 September 1974.

The defendant was charged in three separate bills of indictment with common-law robbery, assault with a deadly weapon with intent to kill, and assault with a deadly weapon with intent to kill inflicting serious injury. The defendant pleaded not guilty and the three charges were consolidated for trial.

The jury returned verdicts of guilty in all three offenses, and from a sentence of imprisonment, the defendant appealed.

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Attorney General Robert Morgan by Deputy Attorney General Andrew A. Vanore, Jr., and Thomas B. Wood for the State.

H. Patrick Taylor, Jr.; Chambers, Stein, Ferguson and Lanning by Jim Fuller for the defendant appellant.

CAMPBELL, Judge.

The defendant was arrested by Highway Patrolman D. W. Tant for driving a motor vehicle upon one of the public highways while under the influence of an intoxicating liquor and for improper automobile registration. The defendant was placed in the patrol car and was being taken to the police station when the following events transpired:

The State's version was that while the patrol car was being started up from a stopped position at an intersection, the defendant announced that he was not going anywhere with the patrolman and started to get out of the car. Thereupon, the defendant opened the car door and drug his feet in the gravel. Tant assumed the defendant was trying to escape and reached over with his right hand and grabbed him by the collar. The patrol car was stopped and a struggle ensued between the defendant and Tant. The defendant bit Tant on the arm and grabbed Tant's pistol. A passerby, John Jefferson Crawford, Jr., stopped and came to the assistance of Tant. At this time, the defendant attempted to hit Tant in the groin area and then grabbed him in that area. When this occurred, Tant let go of the pistol and was hors de combat. A few seconds thereafter the pistol was shot twice with both bullets striking Crawford in the left leg. Crawford requested that the defendant not shoot him anymore, and thereupon the defendant, with the pistol, ordered both Tant and Crawford to leave, which they did. The defendant was last seen by Tant leaving the scene on foot carrying Tant's pistol. Some two days later the defendant surrendered himself to his probation officer Lentz.

The defendant's version was somewhat different. The defendant claimed that while they were on their way to the police station, he requested permission from Tant to urinate. He was refused this permission and was attempting to open the door for the purpose of relieving himself through the open door. At this time Tant grabbed him, and in the ensuing struggle Tant struck him in the head with a slapjack; that in the ensuing struggle with both Tant and Crawford, the pistol was

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fired by mistake and that the defendant had not intended to shoot anyone. The defendant testified that he had taken the pistol because he was afraid that if he left it he might get shot, and he never intended to keep the pistol.

The defendant brings forward three assignments of error.

[1] 1. Failure to charge on self-defense.

The defendant, by his own testimony, admitted that he opened the door to the patrol car while it was moving very slowly and that Officer Tant thought he was getting out of the car. At this time the defendant was under arrest and it was within the province of Tant's office to prevent the defendant from leaving the patrol car. Whatever difficulty then ensued was brought about by the defendant, and the defendant is in no position to rely upon self-defense when he himself brought on the difficulty. There was no error on the part of the trial judge in not giving any instruction to the jury on the right of self-defense. *State v. Horner*, 139 N.C. 603, 52 S.E. 136 (1905).

[2] 2. Refusal to allow cross-examination of the witness Lentz.

The State, in presenting its case, introduced the witness Lentz. On cross-examination the defendant sought to bring out from Lentz certain testimony as to what had been told to him by the defendant when he gave himself up and surrendered the pistol to Lentz. The State's objection to this testimony was sustained and defendant claims this was error and denied the defendant the benefit of some corroborating testimony. At the time this evidence was sought to be elicited from Lentz, the defendant had not gone on the witness stand and therefore it could not be corroborative. *State v. Sutton*, 225 N.C. 332, 34 S.E. 2d 195 (1945); *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971),

After the defendant had gone on the witness stand and testified, the defendant then could have recalled the witness Lentz; and the testimony, insofar as it corroborated the defendant, would have been competent. There was no error in refusing to permit this testimony at the time it was sought.

[3] 3. Failure to grant motion to dismiss.

The defendant asserts error in the denial of the motion to dismiss the charge of common-law robbery. The defendant contends that there was not substantial evidence of a felonious tak-

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ing to support the submission of this offense to the jury. We do not agree. The defendant took the pistol from the scene and kept it two days. This was sufficient evidence to go to the jury as to the intent of the defendant in keeping the pistol. It was a matter for the jury to determine with what intent the defendant took and kept the pistol. It was not error to submit this question to the jury.

No error.

Judges PARKER and VAUGHN concur.

CATHY JANET HALL, BY HER GUARDIAN AD LITEM, EDWARD L. POWELL
v. DR. AMON L. FUNDERBURK AND NORTHERN HOSPITAL OF
SURRY COUNTY

— AND —

JESSIE R. HALL v. DR. AMON L. FUNDERBURK AND NORTHERN
HOSPITAL OF SURRY COUNTY

No. 7421SC709

(Filed 2 October 1974)

1. Physicians and Surgeons § 17— malpractice — summary judgment

In an action to recover damages allegedly caused by the negligence of defendant physician in failing properly to diagnose and treat the minor plaintiff for appendicitis, the materials presented upon defendant's motion for summary judgment show that there is a genuine issue with respect to negligence on the part of defendant in failing to take the minor plaintiff's blood count, and defendant failed to carry his burden of showing that there was no causal relation between his negligence and plaintiff's injury.

2. Physicians and Surgeons § 20; Rules of Civil Procedure § 56— malpractice — motion for summary judgment — burden of showing absence of causation

In a malpractice action, the burden was on defendant movant for summary judgment to establish that there was no causal relation between his negligent act and plaintiff's injury.

APPEAL by plaintiffs from *McConnell, Judge*, 6 May 1974 Civil Session of Superior Court held in FORSYTH County.

These are civil actions instituted by plaintiffs on 26 August 1971, consolidated for trial and appeal. The feme plaintiff

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(Cathy) seeks to recover for personal injuries allegedly caused by the negligence of defendant Funderburk, a physician, in his treatment of her. The male plaintiff seeks to recover for medical expenses and loss of earnings of Cathy, his daughter, during her minority. The actions are based on the alleged negligence of defendants in failing to properly diagnose and treat Cathy for appendicitis.

In their complaints, plaintiffs allege: On 20 August 1970, Cathy, then 14, became nauseated, began to have chills, feel hot and had an elevated temperature. Around midnight on that day, Cathy's mother took her to the emergency entrance of defendant hospital where defendant Funderburk examined her. The mother told defendant Funderburk that Cathy had been nauseated all day, had pain in her abdomen, and suggested that Cathy had appendicitis. Defendant Funderburk examined Cathy, gave her a shot for a virus, and sent her home over the objection of her mother who wanted Cathy admitted to the hospital for overnight observation. The next day Cathy was no better and her mother took her to see their family physician. The family physician examined Cathy and at approximately 5:00 p.m. surgery was performed when it was discovered that her appendix had ruptured.

In apt time, defendant hospital moved for change of venue to Surry County. Plaintiffs then took voluntary dismissals as to defendant hospital, reserving all rights of action against defendant Funderburk (hereinafter referred to as the defendant).

Defendant answered the complaints, denying any negligence in his diagnosis and treatment of Cathy. He also moved for summary judgment under G.S. 1A-1, Rule 56, and filed supporting affidavits and depositions, contending there was no genuine issue of fact for trial. He offered affidavits of four other doctors which tended to show that he had followed accepted medical procedures in diagnosing the case and there was no reason for him to have taken Cathy's blood count. His affidavit tended to show that his diagnosis of Cathy's symptoms was proper. Defendant also denied Cathy's mother's allegation that she told him that Cathy had "doubled over" and she thought Cathy had appendicitis.

Plaintiffs filed counter affidavits and depositions including the affidavit of a doctor averring that defendant should have taken Cathy's blood count. Cathy's mother's deposition set forth facts substantially as alleged in the complaints.

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Upon consideration of the pleadings, depositions and affidavits, the trial judge, being of the opinion that there was no genuine issue of any material fact, allowed defendant's motion and entered summary judgment in his favor. Plaintiffs excepted and appealed.

White and Crumpler, by James G. White and Michael J. Lewis, for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson, by R. M. Stockton, Jr., and James H. Kelly, Jr., for defendant appellee.

BRITT, Judge.

The question presented here is whether the defendant has borne the burden which the law places upon a movant for summary judgment.

Authoritative decisions, both State and federal, interpreting and applying Rule 56, hold that "[t]he party moving for a summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded." 6 Moore's Federal Practice, § 56.15[8], at 2439 (2d ed. 1971); *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972).

[1] In the case at bar, the materials presented show that there is a genuine issue with respect to negligence on the part of defendant. It is well settled, however, that the negligence relied on must be shown to have a causal relationship to the injury in order to avail plaintiff. 6 Strong, N. C. Index 2d, Negligence § 8, pp. 17, 18 (1968). Defendant argues that there is no showing that Cathy's condition was any worse at 5:00 p.m. when she underwent surgery than it was the preceding midnight when defendant examined her. The question then arises, on defendant's motion for summary judgment, was it incumbent on plaintiffs to show causation, or was it incumbent on defendant to show lack of causation? We hold that the burden was on defendant.

[2] A review of the cases cited by defendant reveals that the courts in those cases were passing upon motions interposed at trial for a directed verdict or nonsuit. *Weatherman v. White*, 10 N.C. App. 480, 179 S.E. 2d 134 (1971); *Gower v. Davidian*, 212 N.C. 172, 193 S.E. 28 (1937); *Sinkey v. Surgical Associates*,

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186 N.W. 2d 658 (Iowa 1971); *Skodje v. Hardy*, 47 Wash. 2d 557, 288 P. 2d 471 (1955); and, *Jaeger v. Stratton*, 170 Wis. 579, 176 N.W. 61 (1920). In those cases, the burden was on the plaintiff to show causation but in the instant case on defendant's motion for summary judgment, the plaintiff had alleged causation and it was incumbent upon the defendant as the movant to clearly establish that there was no causal relation between his act and Cathy's injury. This the defendant did not do.

For the reasons stated, the judgment is

Reversed.

Judges HEDRICK and BALEY concur.

STATE OF NORTH CAROLINA v. CARL MICHAEL REID, JR., DAVID
BERNARD McNEELY AND DELTON HARRIS

No. 7419SC674

(Filed 2 October 1974)

Robbery § 4— armed robbery — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution of three defendants for the armed robbery of the cashiers of a Kwik-Pik store where it tended to show that a black male and several other persons entered the store and took the store's money by use of a gun, a witness saw one defendant at a car near the store, saw several black males run to the car from the direction of the store and saw the defendant who stayed with the car drive it away, the car fled when officers tried to stop it within a half hour after the robbery, gunshots were fired from the fleeing car, the car wrecked, the three defendants were found in or lying near the wrecked car, a pistol was found near the car, and money, moneybags taken from the Kwik-Pik and wire similar to that used to tie the hands of the cashiers were found in the wrecked car.

APPEAL by defendants from *Exum, Judge*, 18 February 1974
Criminal Session of Superior Court held in ROWAN County.

By separate bills of indictment, defendants were charged with the armed robbery of Margie DeHart and Ruby Barr, operators or cashiers of a Kwik-Pik store, on 17 September 1973. Defendants pleaded not guilty, a jury found them guilty as charged, and the court entered judgments imposing lengthy prison sentences from which they appealed.

State v. Reid

Attorney General Robert Morgan, by Associate Attorney Thomas M. Ringer, Jr., for the State.

Burke, Donaldson & Holshouser, by Arthur J. Donaldson, for defendant appellant Carl Michael Reid, Jr.

Richard F. Thurston for defendant appellant David Bernard McNeely.

J. Stephen Gray for defendant appellant Delton Harris.

BRITT, Judge.

Defendants assign as error the failure of the court to allow their respective motions for nonsuit. They offered no evidence and the evidence for the State is summarized in pertinent part as follows:

On the evening of 17 September 1973, Margie DeHart and Ruby Barr (hereinafter referred to as cashiers) were employed in the operation of a Kwik-Pik store at 2700 West C Street in Kannapolis. On that date, R. J. Kellerman resided about half a block from the Kwik-Pik store on the same side of the street. There was a wooded lot between Kellerman's home and the store.

Around 7:30 p.m. on that date, Kellerman returned to his home and observed defendant Reid in or near the street in front of the Kellerman home. Reid was standing in front of a 1967 or 1968 model Cadillac with its hood raised. There were five black people in the car at the time. Kellerman asked defendant Reid if he needed any help; Reid replied that his car had overheated and stalled but as soon as it cooled off he would "be on his way." Kellerman then entered his home and did not go out again until about 9:00 p.m.

At approximately 9:00 p.m., a black male entered the Kwik-Pik, pointed a blue steel revolver at the cashiers and told them to "hit the floor." Several other persons then entered the store but the cashiers did not see their faces. The hands of one of the cashiers were tied together with wire. The cashiers recognized the man with the gun but he is not one of the three defendants involved here. One of the cashiers opened the register and safe and the men took \$1,886 that was in a moneybag and a red change bag; they then tied her hands behind her back with wire. They also took the keys to the register, one of the cashier's house key and the cashiers' purses.

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At about 9:00 p.m., Kellerman came out of his house and observed that defendant Reid, then alone, and the Cadillac with hood raised were still on the street. Very soon thereafter, several black males came running across the wooded lot; they and defendant Reid quickly entered the car and Reid drove it away. Kellerman did not recognize anyone except Reid.

At 9:05 or 9:10 p.m. Officers Harrington and Crest arrived at the Kwik-Pik, untied the cashiers and called in a description of the car. Between 9:00 and 9:30 p.m., or "maybe a little later," Officer Sherrill saw a two-tone Cadillac which appeared to have two subjects in the front seat. He followed and stopped the car. As the officer got out of his car, the Cadillac sped away. He radioed for assistance and chased the car at speeds of 80-90 m.p.h. for twenty miles. Gunshots were fired at his car from the driver's side of the Cadillac but he was not sure whether the shots came from the front or the back seat. Thereafter, the Cadillac burst into smoke and turned into a ditch. The officer jumped out of his car, ran to the Cadillac and there found two or three black males on the ground and Reid in the Cadillac. One black, unidentified male ran into the woods.

A second police officer, Powell, also chased the Cadillac, saw three or four black males in it, saw it wreck, and saw occupants jump out of the car and try to escape. Officer Powell quickly alighted from his car and captured defendants Harris and McNeely. Powell saw another occupant of the Cadillac run into the woods but could not identify him. A pistol and a green money-bag were found near defendants Harris and McNeely on the ground. The red change bag taken from the store was in the car.

Officers Harrington and Crest arrived at the scene of the accident at about 10:00 p.m. and the three defendants were in the custody of Officer Powell. Officers Crest and Harrington examined the car and, in the back seat, found money and money-bags identified as that taken from the Kwik-Pik. They also found some wire similar to that used to tie the hands of the cashiers; also a revolver containing three spent shells in the cylinder.

We hold that the evidence was sufficient to survive the motions for nonsuit and the assignment of error is overruled.

The other assignments of error brought forward and argued in defendants' briefs relate to the court's charge to the jury. Suffice it to say, we have carefully reviewed the charge and

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conclude that it is free from prejudicial error. The assignments of error are overruled.

No error.

Judges HEDRICK and BALEY concur.

JOYCE HENLINE PAINTER v. MALCOLM CHAMPY PAINTER

No. 7429DC523

(Filed 2 October 1974)

1. Divorce and Alimony § 23— child support order — child now age 18 — mootness

The correctness of a child support order is moot where the child became 18 years of age while appeal from the order was pending.

2. Divorce and Alimony § 18— right to counsel fees

A spouse who is not entitled to alimony *pendente lite* is also not entitled to an award of counsel fees.

3. Divorce and Alimony § 18— alimony *pendente lite* — living expenses — insufficiency of findings

The court's findings of fact did not support an award of alimony *pendente lite* and counsel fees to the wife where the court found that the wife and her daughter have living expenses of \$400 per month, the daughter became 18 years of age pending appeal of the order, the court made no finding as to the wife's expenses alone, and there was no finding that the daughter is incapable of self-support.

APPEAL by defendant from *Matheny*, District Court Judge, 28 February 1974 Session of McDOWELL County, General Court of Justice, District Court Division.

Plaintiff filed this action for alimony *pendente lite*, counsel fees, temporary possession of the home, and support of the daughter throughout her college career. The trial court found the following facts, *inter alia*:

"1. . . one child, Deborah Lynn, was born of said marriage on April 10, 1956.

* * *

3. That since the separation the defendant has not supported the plaintiff, and has given for the support of their daughter only the sum of \$25.00; that the living

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expenses for the plaintiff and their daughter now are about \$400.00 per month; . . . that the plaintiff owns no property, now has net take home pay of \$51.00 for 4 days work each week after deduction for taxes and sum of \$30.00 each week she deposits in a special account at the Credit Union for sole use of college expenses of their daughter; that to date she has accumulated \$1200.00 for this purpose; . . . that the plaintiff is to have surgery on April 5, 1974, and will be unable to work for a month . . . that she and her daughter are now in urgent need of about \$350.00 per month for support.

* * *

5. That the defendant, age 38, is able to work, and since their marriage has been gainfully employed and now earns net take home pay of \$80.00 for 5 days work, \$115.00 for 6 days, and \$140.00 for 7 days week (sic); that he owns small tract of several acres, owns two trucks . . . had additional income of \$500.00 more each year from cattle trading. . . .
6. That plaintiff and defendant own a home as tenants by the entireties . . . upon which defendant has paid and is paying \$97.00 per month. . . .

The trial court then concluded:

"That plaintiff is a dependent spouse under the law; that she does not have sufficient means or property to subsist during the prosecution of this action, and to defray expenses of same, and that she is entitled to alimony pendente lite at this time, counsel fees, and reasonable support for their child; . . . The court finds that the defendant should pay sum of \$125.00 for plaintiff's counsel, the sum of \$40.00 each week to plaintiff for alimony pendente lite . . . and the sum of \$25.00 per week for support of Debra (sic)"

Furthermore, the court ordered defendant:

" . . . to execute valid title on the 1972 Maverick to plaintiff . . . to vacate the matrimonial home of the parties. to continue to make monthly payments of \$97.00 on debt of the home."

Wingate Cain, Jr., for plaintiff appellee.

Everette C. Carnes, for defendant appellant.

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MARTIN, Judge.

The defendant argues on appeal that the trial court erred in finding that the plaintiff was entitled to alimony *pendente lite* under G.S. 50-16.3 and counsel fees under G.S. 50-16.4. In the alternative, defendant argues that the terms of the trial court's award exceeded its discretion.

[1] It appears from the court's order that the defendant is required to pay \$25.00 per week for the support of a child who was not eighteen years of age at the time of the award but became eighteen pending appeal. As defendant states in his brief, the correctness of the child support order is now moot.

[2] The financial ability of the husband to pay is a major factor in the determination of the amount of subsistence to be awarded. *Schloss v. Schloss*, 273 N.C. 266, 160 S.E. 2d 5 (1968). A spouse who is not entitled to alimony *pendente lite* is also not entitled to an award of counsel fees. *Sprinkle v. Sprinkle*, 17 N.C. App. 175, 193 S.E. 2d 468 (1972). "The remedy of subsistence and counsel fees *pendente lite* is intended to enable the wife to maintain herself according to her station in life and to employ counsel to meet her husband at the trial upon substantially equal terms." *Brady v. Brady*, 273 N.C. 299, page 304, 160 S.E. 2d 13 (1968); *Myers v. Myers*, 270 N.C. 263, 154 S.E. 2d 84. There is no element of punishment involved. *Lemons v. Lemons*, 22 N.C. App. 303, 206 S.E. 2d 327 (1974). In order for the plaintiff to be awarded alimony *pendente lite* in the case at bar, it must appear that she is the dependent spouse, that she is entitled to the relief she demands and that she is without means to subsist during the pendency of this action. *Hogue v. Hogue*, 20 N.C. App. 583, 202 S.E. 2d 327 (1974). Subdivision (1) and (2) under G.S. 50-16.3(a) are conjunctive, and the grounds stated in both subdivisions must be found to exist before alimony *pendente lite* may be awarded. *Hogue v. Hogue*, *supra*.

[3] According to the record, the plaintiff and her daughter have living expenses of \$400.00 per month. Using this figure, the wife's expenses clearly exceed her income. Pending appeal, the daughter became age eighteen. The wife's expenses alone were not set out by the trial court, and there was no finding that the daughter is incapable of self-support. These findings, at least, were necessary to support the court's order.

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The alimony *pendente lite* order and other orders are vacated and the cause is remanded for further hearing.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. FRANKLIN HAWLEY

No. 749SC574

(Filed 2 October 1974)

Criminal Law §§ 18, 157— misdemeanor — failure to show jurisdiction of superior court

Appeal is dismissed for failure of the record to show how the superior court obtained jurisdiction of a misdemeanor tried upon a warrant of the district court.

APPEAL by defendant from *Bailey, Judge*, February 1974 Criminal Session of GRANVILLE Superior Court.

The record filed indicates that defendant was tried in the Superior Court on warrants charging him with the misdemeanors of reckless driving and driving while his operator's license was revoked. The solicitor took a *nol pros* with leave on the charge of reckless driving. Defendant was found guilty of driving while his license was revoked and was sentenced to be imprisoned for two years.

Attorney General Carson, by Assistant Attorney General Raymond W. Dew, Jr. and Associate Attorney John R. Morgan, for the State.

Smith & Banks, for defendant appellant.

MARTIN, Judge.

There is nothing in the record to disclose how the superior court obtained jurisdiction of this case. "The Court of Appeals will take notice *ex mero motu* of the failure of the record to show jurisdiction in the court entering the judgment appealed from." *State v. Byrd*, 4 N.C. App. 672, 673, 167 S.E. 2d 522 (1969). It is the duty of the defendant appellant to see that the record on appeal is properly made up and transmitted to the Court of Appeals. *State v. Parks*, 20 N.C. App. 207, 200 S.E. 2d 837 (1973); *State v. Marshall*, 11 N.C. App. 200, 180 S.E.

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2d 464 (1971); *State v. Byrd, supra*. The superior court has no jurisdiction to try an accused for a misdemeanor upon a warrant of the district court unless he is first tried and convicted for such misdemeanor in the district court and appeals to the superior court from the sentence imposed in the district court. *State v. Parks, supra*; *State v. Marshall, supra*; *State v. Byrd, supra*. For failure to show jurisdiction, the appeal must be dismissed. *State v. Banks*, 241 N.C. 572, 86 S.E. 2d 76 (1955); *State v. Marshall, supra*.

Appeal dismissed.

Chief Judge BROCK and Judge MORRIS concur.

TERRELL C. BROWN AND SHARON BROWN v. PAUL SMITH AND
ELLA SMITH

No. 7423DC534

(Filed 2 October 1974)

Appeal and Error § 39— extension of time to docket record — order entered after expiration of 90 days

The trial judge had no authority to extend the time for docketing the record on appeal by an order entered after the expiration of the 90 days allowed by Court of Appeals Rule 5.

APPEAL by defendants from *Osborne, Judge*, 21 January 1974 Session of WILKES County District Court. Heard in the Court of Appeals 5 September 1974.

This is an action seeking specific performance of a contract for the sale of land. Defendants answered that the contract of sale and the agency contract were induced by fraud and deceit. The jury found that the defendants had voluntarily and knowingly executed the contracts in question. Judgment was entered requiring the defendants to execute a warranty deed to plaintiffs in accordance with the contracts.

Joe O. Brewer, for the plaintiffs.

Franklin Smith, for the defendants.

State v. Wilson

BROCK, Chief Judge.

Judgment of the trial court in this case was signed and filed on 24 January 1974. Under Rule 5 the record on appeal must be docketed within 90 days after the date of the judgment appealed from, unless the trial tribunal extends the time, not exceeding an additional 60 days, to docket the record on appeal.

The 90 days provided by Rule 5 expired on 24 April 1974. The record on appeal was not docketed until 8 May 1974.

On 2 May 1974 appellant secured an order from the trial judge purporting to grant appellant an additional 15 days to docket the record on appeal. The trial judge had no authority to extend the time for docketing by an order entered after the expiration of the 90 days allowed by Rule 5. *Simmons v. Textile Workers Union*, 15 N.C. App. 220, 189 S.E. 2d 556; *Beck Distributing Corp. v. Imported Parts, Inc.*, 10 N.C. App. 737, 179 S.E. 2d 793. At the time the 2 May 1974 order was entered, the appeal was already subject to dismissal for failure to docket on time. The 2 May 1974 order is a nullity.

Appeal dismissed.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. CARL ROBERSON WILSON

No. 7417SC718

(Filed 2 October 1974)

1. Crime Against Nature § 2— indefiniteness of physician's opinion — refusal to allow explanation — absence of prejudice

In a prosecution for crime against nature, defendant was not prejudiced by the court's refusal to allow the physician who examined the eight-year-old victim to give an explanation for being unable to reach a definite opinion as to whether penetration of the victim's rectum had occurred since the physician's answer could not have added anything to the testimony he was permitted to give.

2. Criminal Law § 46— instruction on flight — supporting evidence

In a prosecution for crime against nature, the court's instruction on flight was supported by evidence that defendant was called and told by his cousin that he was accused of molesting an eight-year-old child, that defendant stated he would "be up there" as soon as he

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could get there, that defendant never arrived nor communicated with his accusers, and that later efforts to locate him were unsuccessful.

APPEAL by defendant from *Rousseau, Judge*, 1 April 1974 Session of Superior Court held in ROCKINGHAM County.

Defendant was indicted for committing a crime against nature. The act complained of was anal intercourse with an eight-year-old boy. The jury returned a verdict of guilty, and the court entered judgment imposing prison sentence of ten years. Defendant appealed.

Attorney General James H. Carson, Jr., by Associate Attorney Thomas M. Ringer, Jr., for the State.

Gwyn, Gwyn & Morgan, by Melzer A. Morgan, Jr., for defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the refusal of the trial court to allow the physician who examined the child several hours after the alleged crime had taken place to give an explanation for being unable to reach a *definite* opinion as to whether penetration had occurred. The assignment is without merit.

The physician's testimony tended to show: There was a slight reddening or irritation in the child's rectal area; there was no bruising, no tearing, no cuts or bleeding and no sperm was found. There was some stool smeared around the rectum. The reddening could have been caused from not washing or could have been caused by a slight penetration or attempt to penetrate.

The physician, called as a witness by defendant, was asked several times to explain why he did not have an opinion regarding penetration; upon objections by the State, the court did not allow the explanation. We fail to see how the physician's answer to the question could have added anything to the testimony he was allowed to provide. This being so, the defendant was in no way prejudiced.

[2] Defendant's second assignment of error is that the trial judge should not have instructed the jury on the question of flight since there was insufficient evidence to support such an instruction. The evidence tended to show: Defendant was called by his cousin and told that he had been accused of molesting

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an eight-year-old child and to come and "get it straightened out." Defendant advised that he would "be up there" as soon as he could get there; he never arrived nor communicated with his accusers. Later efforts to locate him were unsuccessful. We hold that the evidence was sufficient to support the court's instruction with respect to flight.

We have reviewed the record and briefs with respect to the remaining assignments of error and find that they too are without merit.

No error.

Judges HEDRICK and BAILEY concur.

COMMERCIAL CREDIT CORPORATION v. JOHN WILLIE PEARSON,
JR., AND DOVIE M. PEARSON

No. 7410DC730

(Filed 2 October 1974)

Trial § 48— denial of motion to set aside judgment

The trial court did not abuse its discretion in the denial of defendants' motion to set aside the judgment and grant them a new trial.

APPEAL by defendants from *Barnette, Judge*, 22 March 1974 Session of District Court held in WAKE County.

Plaintiff instituted this action to recover \$604.91, the alleged balance due on a conditional sales contract after the automobile encumbered by the contract had been sold and proceeds of the sale applied to the indebtedness. Neither party demanded a jury trial.

Following a trial on 7 February 1974, the court made findings of fact and conclusions of law and entered judgment in favor of plaintiff for the amount prayed, plus interest and costs. On 12 February 1974, pursuant to G.S. 1A-1, Rules 59 and 60, defendants filed a motion asking that the judgment be set aside and a new trial be granted. On 26 March 1974, the court entered an order (filed 28 April 1974) denying defendants' motion, from which order they appealed.

State v. Chappell

Brady, Gardner and Wynne, by Donald E. Wynne, for plaintiff appellee.

Vaughan S. Winborne for defendant appellants.

BRITT, Judge.

Defendants' sole assignment of error is to the signing of the order denying their motion to set the judgment aside and grant them a new trial. Assuming, *arguendo*, that the court had authority to grant defendants' motion, the allowance or disallowance of the motion was in the discretion of the trial judge. Defendants have failed to show abuse of discretion, therefore, the order appealed from is

Affirmed.

Judges HEDRICK and BALEY concur.

STATE OF NORTH CAROLINA v. BARRY LEE CHAPPELL

No. 749SC702

(Filed 2 October 1974)

Criminal Law §§ 113, 119— instructions on evidence — instructions not requested

In the absence of a request, the trial court was not required to instruct the jury that they were to use their own memory in recalling the evidence and that they were not to take his recapitulation of the evidence as fact.

APPEAL by defendant from *Bailey, Judge*, 18 February 1974 Session of Superior Court held in PERSON County.

Defendant was convicted of resisting a public officer while the officer was attempting to arrest defendant, a violation of G.S. 14-223. After a verdict of guilty, judgment was entered imposing an active sentence within the limits provided by law.

Attorney General James H. Carson, Jr., by Walter E. Ricks III, Assistant Attorney General, and C. Diederich Heidgerd, Associate Attorney, for the State.

Burke and King by Ronnie P. King for defendant appellant.

State v. Bethune

VAUGHN, Judge.

Defendant's court appointed counsel contends that it was error for the judge to fail to instruct the jury that they were to use their own memory in recalling the evidence and that they were not to take his recapitulation of the evidence as fact. Defendant did not request the Court to give that instruction and it is not required in the absence of a request. *State v. Harris*, 213 N.C. 648, 197 S.E. 142.

Defendant has brought forward other assignments of error which we find to be without merit. We find no prejudicial error in defendant's trial.

No error.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. ANDREW BETHUNE, JR.

No. 7412SC650

(Filed 2 October 1974)

APPEAL by defendant from *Canaday, Judge*, 29 April 1974 Session of Superior Court held in HOKE County.

Attorney General James H. Carson, Jr., by Myron C. Banks, Assistant Attorney General, for the State.

R. Palmer Willcox for defendant appellant.

VAUGHN, Judge.

Defendant was duly convicted of robbery with firearms and judgment imposing a prison sentence within lawful limits was entered. Although defendant gave notice of appeal, his counsel has brought forward no assignments of error. Counsel frankly states in the case on appeal that, after careful review of the trial record, he is unable to find anything to assign as prejudicial error. Counsel asks the Court to review the record for possible errors. This Court has reviewed the record and finds no prejudicial error.

No error.

Judges CAMPBELL and PARKER concur.

Shook v. Peavy

ROSS G. SHOOK AND WIFE, RUTH H. SHOOK, AND ROY JUNIOR
PEAVY v. MARY W. PEAVY AND THE IREDELL COUNTY DE-
PARTMENT OF SOCIAL SERVICES

No. 7422DC531

(Filed 3 October 1974)

1. Infants § 11— hearing to determine child neglect — right of custodian to be heard

In a hearing to determine whether a child is neglected, the child or his parents, guardian or custodian has the opportunity to present evidence if they desire to do so; therefore, plaintiffs Shook, who the parties stipulated were the "custodians of the child" whose custody was at issue, had a right to be heard at the hearing to determine neglect of the child. G.S. 7A-285.

2. Infants § 9; Parent and Child § 1— custodian of child — person in loco parentis — definitions

A custodian is a person or agency that has been awarded legal custody of a child by a court, or a person other than parents or legal guardian who stands *in loco parentis* to a child; a person *in loco parentis* may be defined as one who has assumed the status and obligations of a parent without a formal adoption. G.S. 7A-278(7).

3. Courts § 16— custody of child — no appeal from one district judge to another

While the general rule is that no appeal lies from an order of one district judge to another, that rule was inapplicable in this child custody proceeding where an original order declaring a child neglected was the result of a hearing in which custody was not properly brought to issue or determined.

APPEAL by defendants from *Cornelius, District Judge*, 4 March 1974 Session of District Court held in IREDELL County.

This is a civil action instituted 8 March 1974 wherein plaintiffs sought custody of the infant, Terry Wayne Peavy, and a temporary custody order.

The trial court made the following pertinent findings and conclusions:

"1. That on March 8, 1974 the plaintiffs filed a verified Complaint seeking custody of a minor child; namely, Terry Wayne Peavy.

2. That said Complaint, being verified is considered by this Court to be an affidavit.

* * *

4. That the said minor child resided with the plaintiffs, Ross G. Shook and wife, Ruth H. Shook, from on or

Shook v. Peavy

about August 31, 1973, until February 28, 1974, when the said child was turned over to the Iredell County Department of Social Services pursuant to the petition of said department alleging that the child was neglected by its parents and was not legally placed with the plaintiffs.

5. That on February 28, 1974, the issue of whether custody should be awarded to the plaintiffs was not litigated or heard.
6. That a hearing as to whether the custody of said child should be placed with the plaintiffs will be scheduled pursuant to a Notice of Hearing filed this date.
7. That in view of the said minor child having resided for such a lengthy period of time with the plaintiffs and thereby establishing a stable relationship and residence with the plaintiffs, it appears to the Court that custody of the said child should be vested in the plaintiffs pending a full hearing pursuant to the cause filed by the plaintiffs and that placing temporary custody of the child with the plaintiffs would best serve the interests of said child.

* * *

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Iredell County Department of Social Services immediately return Terry Wayne Peavy to the custody of the plaintiffs . . . until a final determination is made in the cause."

Collier, Harris, Homesley, Jones & Gaines, by Walter H. Jones, Jr., for plaintiffs appellees.

Pope, McMillan & Bender, by W. H. McMillan, for defendants appellants.

MARTIN, Judge.

Defendants argue that the temporary custody order of 8 March 1974, should be vacated in that it overrules an earlier order by another district judge, made on 28 February 1974, pursuant to a petition by the Department of Social Services to declare Terry Wayne Peavy a neglected child.

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In its 8 March order, the trial court found "That on February 28, 1974, the issue of whether custody should be awarded to plaintiffs was not litigated or heard." Furthermore, the parties to this action stipulated that plaintiffs sought to introduce evidence at the 28 February hearing but the court declined to hear further evidence after defendant (then petitioner) had put on its evidence.

[1, 2] G.S. 7A-285 discusses the type of hearing which should take place in determining whether a child is neglected. It provides in part that "The child or his parents, guardian or custodian shall have an opportunity to present evidence if they desire to do so, or they may advise the court concerning the disposition which they believe to be in the best interest of the child." G.S. 7A-278(7) defines custodian as a "person or agency that has been awarded legal custody of a child by a court, or a person other than parents or legal guardian who stands in loco parentis to a child." "The term 'in loco parentis' means in the place of a parent, and a 'person in loco parentis' may be defined as one who has assumed the status and obligations of a parent without a formal adoption." 67 C.J.S., "Parent and Child," § 71, p. 803. The parties have stipulated that the Shooks were the "custodians of the child." Clearly, the Shooks had a right to be heard at the 28 February hearing.

[3] Defendants point out the general rule that no appeal lies from an order of one district judge to another. We do not argue with this statement. We just do not think it is applicable to the situation before us. We have said in *In re Holt*, 1 N.C. App. 108, 160 S.E. 2d 90 (1968), that "[W]here custody and support has not been brought to issue or determined, the custody and support issue may be determined in an independent action in another court." Accord, *Wilson v. Wilson*, 11 N.C. App. 397, 181 S.E. 2d 190 (1971). Since the 28 February 1974 order declaring the child neglected was the result of a hearing in which custody was not properly brought to issue or determined, we fail to see how it has been overruled by the later custody order of 8 March 1974.

It is ordered that this opinion be certified forthwith to the Iredell County District Court.

Affirmed.

Chief Judge BROCK and Judge MORRIS concur.

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MOSSETTE L. BUTLER AND WIFE, BETTY F. BUTLER; AND FRANCES B. RICHARDS AND HUSBAND, DOUGLAS L. RICHARDS v. FAYE R. WEISLER AND HUSBAND, L. F. WEISLER

No. 7313SC668

(Filed 16 October 1974)

1. Partition § 1— right to partition

A tenant in common is entitled, as a matter of right, to a partition of the land to the end that he may have and enjoy his share therein in severalty unless it is made to appear that an actual partition cannot be had without injury to some or all of the interested parties, in which case a sale of the property may be ordered by the court. G.S. 46-22.

2. Partition § 8— order of sale — absence of evidence

Orders of an assistant clerk of superior court directing and confirming a sale of land for partition are set aside where the record reveals that at the time the order of sale was entered no witnesses were sworn, no evidence was presented and no findings of fact were made to support the conclusion that an actual partition of the land could not be made without injury to the parties interested therein, the order of sale was presented jointly to the assistant clerk by attorneys for petitioners and defendants but did not purport to be a consent order, and there has been no finding that the attorney for defendants had actual authority to consent to a sale of defendants' interest in the property.

APPEAL by defendants from order dated 23 April 1973 entered by *Clark, Judge*, in Chambers in Superior Court in BLADEN County.

Special proceeding for sale of real property on petition for partition. The land in question is a long, narrow lot approximately 60 feet wide and just over 700 feet long. It fronts 66 feet on White Lake and extends for its full length eastward from the lake to the paved highway, on which it has a frontage of 60 feet. There is a cottage on the lot near to the lake.

In their petition filed 30 August 1971 the original petitioners, Mossette L. Butler and wife, Betty F. Butler, alleged that the lot is owned in common by Mr. and Mrs. Butler, Mr. and Mrs. Richards, and Mr. and Mrs. Weisler, a one-third undivided interest being vested in each couple as tenants by the entirety; that petitioners desire to hold their interest in severalty; and that, because of the narrow lake frontage, actual partition cannot be made without injury to the parties. Mr. and Mrs. Richards and Mr. and Mrs. Weisler were originally named as defendants in

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the petition, but Mr. and Mrs. Richards were subsequently permitted to join in the petition as petitioners.

On 15 September 1971 defendants, Mr. and Mrs. Weisler, represented by Attorney N. H. Person, filed answer in which they admitted the ownership as alleged in the petition but denied that the lot could not be partitioned without injury to the parties. In support of this contention, defendants pointed out that there is an easement for a 10-foot-wide common alleyway running from the highway to the lake, the center line of which alleyway runs with the common boundary line dividing the lot in question from the adjacent tract on the south. Defendants prayed for actual partition rather than a sale of the property.

For several months after the pleadings were filed the attorneys, N. H. Person for defendants and Edwin E. Butler for petitioners, attempted to reach a compromise but were unable to do so. In January 1972 the Weislars, who were residents of California, also employed as counsel Robert P. McNamee, an attorney who lived near them in California. In February 1972 they discharged N. H. Person, and on 28 February 1972 at the request of the Weislars, Attorney McNamee employed Reuben L. Moore, Jr., an attorney of Bladen County, N. C., to represent them in this proceeding. Negotiations for a settlement continued. These resulted in an agreement between Attorney Moore representing defendants and Attorney Butler representing petitioners under which a lot fronting 60 feet on the highway and having a depth of 200 feet would be conveyed to defendants in severalty for their interest in the property, and on 22 March 1972 a consent order to effectuate this settlement was mailed to Attorney McNamee. In late April 1972 Attorney McNamee advised Attorney Moore that defendants would not accept the lot on the highway unless petitioners agreed to give them a right of access to the lake across the alleyway easement and the right to construct and use a pier in the lake at the end of the alleyway. This counter proposal was rejected by petitioners.

The matter came on for hearing before the Assistant Clerk of Superior Court on 26 May 1972, at which time Attorney Butler appeared for petitioners and Attorney Moore appeared for defendants. The attorneys presented to the Assistant Clerk a judgment which they had prepared and informed her that it had been agreed upon between counsel. No evidence was presented to the Assistant Clerk, but a plat of the property was shown to her and she was informed by the attorneys concerning

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an appraisal which had been made of the property. The Assistant Clerk then signed the order as prepared by the attorneys. This order, which was dated 26 May 1972, recited that "after due inquiry" it appeared to and was found by the court "that an actual partition of the lands mentioned and described in said petition cannot be made without injury to the parties interested therein" and "that a sale of said lands would be more advantageous to the parties than a division thereof." On these findings, Edwin E. Butler and Reuben L. Moore, Jr., were appointed co-commissioners and were authorized and directed to sell the land at public auction.

Pursuant to this order and after due advertisement, the co-commissioners offered the property for sale at public auction at the courthouse door in Elizabethtown at noon on 12 July 1972. At this sale Edmond B. Flynt, Jr. became the last and highest bidder at a price of \$36,400.00. The co-commissioners reported this bid to the court on 12 July 1972, and no upset bid being filed, on 25 July 1972 the Assistant Clerk of Superior Court signed an order confirming the sale.

On 24 July 1972, the day preceding entry of the confirmation order, Faye R. Weisler, one of the defendants, signed and filed with the court a written statement that she did not wish the sale confirmed and wished to appeal to the Superior Court. On 26 July 1972 one of the commissioners, Edwin E. Butler, moved to dismiss the appeal for failure to enter the same in apt time following entry of the 26 May 1972 order. Also on 26 July 1972 the law firm of Moore & Melvin filed a motion to be relieved as counsel for the defendants Weisler, citing that irreconcilable differences had arisen between the firm and the defendants and that Faye R. Weisler had stated she no longer desired the firm's services. On 26 July 1972 Judge Edward B. Clark signed an order relieving the firm of Moore & Melvin as counsel of record for defendants Weisler.

On 26 July 1972 Judge Clark also signed an order concluding "[t]hat the defendant herein, Faye R. Weisler, by failing to appeal in apt time as required by G.S. 1-279 [sic] has lost her right to appeal since more than ten days have expired since the order directing that the property be sold." As originally signed, this order also confirmed the order of the Assistant Clerk confirming the sale and directing the co-commissioners to execute a deed to the purchaser, but these provisions were deleted by Judge Clark on 19 August 1972.

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On 4 August 1972 defendants, through their new attorneys, Powell, Lee & Lee, filed a motion under Rules 59 and 60 to set aside Judge Clark's order of 26 July 1972 for mistake, inadvertence, and excusable neglect, asserting as grounds that there had been misunderstandings between defendants and their previous attorneys which prevented defendants from having a fair trial and on the further grounds that there was insufficient evidence to justify a finding of fact that the lands in question could not be divided and should be sold. After Judge Clark corrected his 26 July 1972 order by deleting the portion thereof which purported to confirm the Assistant Clerk's order confirming the sale, defendants on 30 August 1972 filed a further motion, dated 28 August 1972, in which they prayed that the motion previously filed before Judge Clark be directed to the Assistant Clerk, that she set a time for hearing thereon, "take such testimony as may be necessary and enter such appropriate orders as justice requires." A hearing was held before the Assistant Clerk on 28 September 1972, at which time defendant Faye R. Weisler, and her former attorney, Reuben L. Moore, Jr., appeared and testified. For purposes of this hearing and by stipulation of counsel there was also presented to the Assistant Clerk affidavits of the attorneys, Robert P. McNamee and Reuben L. Moore, Jr., and an affidavit dated 28 September 1972 signed by a Mr. James G. Thomas. The affidavits of the two attorneys were principally directed to describing the steps which had been taken by them, prior to entry of the 26 May 1972 order, in their unsuccessful efforts to effect a compromise under which defendant might retain title to a portion of the property fronting on the highway. The affidavit of Mr. Thomas stated that prior to 7 March 1972 he had been employed by Mossette Butler, one of the petitioners, to give an appraisal of the property, and that soon after 7 March 1972 he had also been employed by Attorney Moore to make a determination whether the property could be actually partitioned in such manner that there would be no injury to any of the parties. The Thomas affidavit further stated that he had advised Attorney Moore that in his opinion actual partition could not be made without injury to the parties, that the entire tract in an undivided condition had a fair market value of \$30,000.00, that if divided into three lots the fair market value would be \$25,000.00, and that this decrease in value was due to the loss of privacy for the lake front portion of the lot incident to increased use of the right-of-way by persons occupying the rear lots.

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Following the hearing on 28 September 1972, an order was signed by the Assistant Clerk dated 7 March 1973 in which detailed findings of fact were made, including a finding "that actual partition of the lands could not be made without injury to the tenants in common, and that in order that an equitable partition could be made it was necessary that said lands be sold." The order reaffirmed the previous order of 26 May 1972 and dismissed the appeal from that order. On 14 March 1973 defendants excepted to the Assistant Clerk's order and gave notice of appeal to the Judge of Superior Court.

The appeal from the order of the Assistant Clerk was heard before Judge Edward B. Clark, Resident Judge of Superior Court. By agreement of the parties the Judge heard the matter "de novo upon the pleadings, the record, the transcript of testimony and the affidavits made in and for the hearing before the Clerk on September 28, 1972." At the conclusion of the hearing, the Judge entered an order dated 23 April 1973 in which he made findings of fact, including a finding that both the Judge and the Assistant Clerk "have resided in Bladen County and only a few miles from White Lake for more than half a century . . . and know the worth and high value of waterfront property and the disadvantages and reduced market value to owners of waterfront property that results when back lots are occupied by owners who have access of alleyways and community piers." The Judge concluded as a matter of law "[t]hat the findings of the Assistant Clerk in her Order of May 26th, after hearing and due inquiry, 'that an actual partition of the lands . . . cannot be made without injury to the parties,' is a finding of ultimate fact, did not need to be supported by findings of evidentiary fact, and was based on her independent knowledge of White Lake, examination of a map showing the size, nature and location of the property, the opinion of realtor James G. Thomas, and discussion of counsel."

Based upon the findings of fact and conclusions of law made in his order of 23 April 1973, Judge Clark denied defendants' motion filed 4 August 1972 to set aside the order of the Assistant Clerk dated 26 May 1972 which directed a sale of the property and the July order of the Assistant Clerk which confirmed the sale. Defendants appealed.

Butler & Butler by Edwin E. Butler for plaintiff appellees.

Powell, Lee & Lee by J. B. Lee for defendant appellants.

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PARKER, Judge.

The question presented is whether defendants are entitled to relief from the orders of the Assistant Clerk which directed and later confirmed the sale of the real property in which defendants own a one-third undivided interest. A proper solution of this question requires that we first determine the substantive rights, vis-a-vis each other, of parties owning interests in real property as tenants in common.

[1] "A tenant in common is entitled, as a matter of right, to a partition of the land to the end that he may have and enjoy his share therein in severalty, unless it is made to appear that an actual partition cannot be had without injury to some or all of the interested parties," *Seawell v. Seawell*, 233 N.C. 735, 65 S.E. 2d 369 (1951), in which case a sale of the property may be ordered by the court. G.S. 46-22. However, a partition in kind, if it can be fairly accomplished, is always favored over a sale, since this does not compel a person to sell his property against his will. *Brown v. Boger*, 263 N.C. 248, 139 S.E. 2d 577 (1965). In the case last cited, Moore, J., speaking for our Supreme Court, said (at pp. 256 and 257) :

"It is essential to a sale of land for partition that it be established that an actual division in kind cannot be made without *injury to some or all* of the cotenants. G.S. 46-22. By 'injury' to a cotenant is meant substantial injustice or material impairment of his rights or position, such that it would be unconscionable to require him to submit to actual partition. 68 C.J.S., Partition, § 127, p. 190. Since partition in kind is favored, such partition will be ordered, even though there may be some slight disadvantages in pursuing such method. *Ibid.*, p. 192. A sale will not be ordered merely for the convenience of one of the cotenants. *Ibid.*, p. 190. The physical difficulty of division is only a circumstance for the consideration of the court. *Mineral Co. v. Young, supra* [220 N.C. 287, 17 S.E. 2d 119]. On the question of partition or sale the determinative circumstances usually relate to the land itself, and its location, physical condition, quantity, and the like. 68 C.J.S., Partition, § 127, p. 193. 'The test of whether a partition in kind would result in *great prejudice* to the cotenant owners is whether the value of the share of each in case of a partition would be *materially less* than the share of each in the money equivalent that could probably be obtained for the whole.'

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(Emphasis added.) 4 Thompson on Real Property, § 1828, p. 309. But many considerations, other than monetary, attach to the ownership of land. *Hale v. Thacker*, 12 S.E. 2d 524 (W.Va. 1940). No exact rule is possible of formulation to determine the question whether there should be a partition in kind or a partition by sale. The determination must be made on the facts of the particular case. 68 C.J.S., Partition, § 127, p. 190. There should be a partition in kind unless such partition will cause material and substantial injury to some or all of the parties interested.

"The court has no authority to order a sale of land for partition without satisfactory proof of facts showing that an actual partition will cause injury to some or all of the cotenants. *Wolfe v. Galloway*, *supra* [211 N.C. 361, 190 S.E. 213]. The essential facts must be found by the court. *Seawell v. Seawell*, *supra* [233 N.C. 735, 65 S.E. 2d 369]."

[2] Examining the present proceedings in the light of the foregoing principles, the record reveals that at the time the order of sale was entered by the Assistant Clerk on 26 May 1972, no witnesses were sworn, no evidence was presented, and no findings of the essential facts were made to support the conclusion arrived at "that an actual partition of the lands mentioned and described in said petition cannot be made without injury to the parties interested therein." At the hearing held 28 September 1972 on defendants' motion to be relieved from the order of sale petitioners' attorney, Edwin E. Butler, stipulated that:

"Mr. Moore [the attorney who represented defendants when the order of sale was entered] and myself came before Mrs. Campbell [the Assistant Clerk] with the judgment prepared and told her that it had been agreed upon between counsel, that she should sign that order and that thereupon she signed it."

At the same hearing on 28 September 1972, Attorney Moore testified:

"Mr. Butler prepared the May 26 order. We did not preempt the prerogative of the Clerk and tell her she had to sign it. We came in with the order of sale prepared. We had some conversation about the matter. I think we had some conversation on behalf of Mr. Butler who had a plat of the land. I believe we had some conversation concerning

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the appraisal that Mr. James Thomas had made. In our conversation we told Mrs. Campbell that we were in accord and that the order of sale was satisfactory to all parties involved and based on what she knew of the case and what she heard us talk about and what she felt was right, she signed it. No, there were no witnesses sworn in. There were no other parties present. None of the petitioners nor Mrs. Weisler were present. There was no hearing other than the conversation between the three of us."

Mr. Thomas, the realtor who had appraised the property, did not appear and testify, and his opinion as to a reduction in value of the entire property which might result from an actual partition was not even reduced to affidavit form until long after the order of sale was entered. Such independent knowledge as the Assistant Clerk may have had of land values in the White Lake area and of "the disadvantages and reduced market value to owners of waterfront property that results when back lots are occupied by owners who have access by alleyways and community piers," was an inadequate substitute for competent evidence.

The Assistant Clerk had the same powers as the Clerk of Superior Court would have had. G.S. 7A-102(b). In this proceeding she had jurisdiction over the parties and over the subject matter. Her orders directing and confirming the sale were therefore not void. However, because these orders were entered without essential findings of fact arrived at upon the basis of competent evidence, the orders were voidable and were subject to be set aside upon a timely motion under Rule 60(b)(6) of the Rules of Civil Procedure.

That Attorney Moore sincerely felt he was representing the best interest of his clients when he joined in presenting the order of sale to the Assistant Clerk and that he may even have understood, mistakenly as it turned out, that he had actual authority from them to agree to a sale, cannot make the order binding on defendants. "An attorney has no inherent or imputed power or authority to compromise his client's cause or consent to a judgment which gives away the whole corpus of the controversy," *Howard v. Boyce*, 254 N.C. 255, 118 S.E. 2d 897 (1961), and there has been no finding that Attorney Moore had been given actual authority from his clients to consent to a sale of their interest in the property. The order of sale did not purport to be a consent order, but on its face purported to have

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been entered after a hearing. Since no hearing was in fact held, defendants' motion to be relieved from the sale orders should have been allowed.

The order appealed from which denied defendants' motion is reversed, and this proceeding is remanded to the Superior Court in Bladen County with directions that the orders of the Assistant Clerk which directed and confirmed the sale be vacated and for further proceedings not inconsistent herewith.

Reversed and remanded.

Chief Judge BROCK and Judge VAUGHN concur.

DONALD G. RAPE, CAROLINE C. RAPE AND LARRY A. RAPE v. WOODROW W. LYERLY AND WIFE, SUDIE D. LYERLY, KATHERINE L. MACK AND HUSBAND, PHILIP MACK AND A. GRAY LYERLY

No. 7419SC639

(Filed 16 October 1974)

1. Frauds, Statute of §§ 2, 7; Wills § 2— contract to devise property — sufficiency of revoked will as memorandum

A revoked will executed by the testator in 1959 and placed with the father of plaintiffs for safekeeping provided a sufficient memorandum of the agreement between testator and plaintiffs' mother to comply with the Statute of Frauds where the will included a promise by testator to leave the mother all of his property in return for the mother's obligation to care for testator and his wife and to pay certain sums to his other children.

2. Wills § 2; Specific Performance— contract to devise property — substituted parties — specific performance proper

In an action for specific performance of an alleged contract to devise real estate, evidence was sufficient to show that testator, by accepting the services of the father and the plaintiff children in the place of the mother, effectively substituted them in the original contract to the end that they are now entitled to specific performance of that contract where such evidence tended to show that the father, children and testator continued to live together after the death of the mother, the father and children took care of testator's every need, and testator expressed his satisfaction to others with respect to the treatment he received from the father and children.

3. Contracts § 2— substitution of parties — objection within reasonable time

Parties can be substituted in a personal contract when the parties do not object and they fully acquiesce in accepting the services

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performed by the substituted party; if a party does object to substituted performance he must rescind within a reasonable time so as not to injure the substituted party.

Judge HEDRICK dissents.

APPEAL by defendants from *Crissman, Judge*, 28 January 1974 Civil Session of Superior Court held in ROWAN County.

Plaintiffs instituted this action on 5 May 1972 seeking specific performance of an alleged contract to convey real estate. In their complaint they allege: In March of 1959, James Richard Lyerly (Jim) entered into an agreement with his daughter, Mildred Lyerly Rape (Mildred), and his son, defendant Woodrow W. Lyerly (Woodrow), under which Mildred and Woodrow obligated themselves to care for Jim and his wife (Pearl) during their lifetime. In return, Jim agreed to leave all of his real estate to Mildred upon condition that she pay Woodrow \$6,000, defendant A. Gray Lyerly \$1,000, and defendant Katherine L. Mack \$1,000. A writing embodying the agreement was signed by Jim on 21 March 1959. Mildred died in 1965 and thereafter her obligation to care for Jim and Pearl was performed by her husband, Basil Rape (Basil), and her three children, the plaintiffs. Pearl died in 1966 and Jim died on 23 November 1970. Jim left a will devising substantial parts of his real estate to defendants, contrary to his agreement with Mildred. Plaintiffs have demanded that defendants convey the real estate to them and have offered to pay defendants the amounts agreed upon by Jim and Mildred. Defendants have refused to convey the land.

Defendants filed motions to dismiss and for summary judgment, which motions were denied. At trial plaintiffs offered evidence summarized in pertinent part as follows:

Basil married Mildred in 1943, entered the armed forces and returned from World War II in 1945. Upon his return, Basil and Mildred moved in with Jim and Pearl. Their first son, Larry, was born 20 November 1945. In the spring of 1946, Basil, Jim and Woodrow began farming together with Basil operating a dairy. Between 1946 and 1959, Basil and Mildred had two more children, Donald, born in 1949, and Caroline, born in October 1950. By 1959 Basil and Mildred decided to move out of Jim's house and build a home of their own.

When Jim discovered that Basil and Mildred were planning to move out, he asked them to stay and take care of him and

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Pearl; in return he would let them remodel the house and would leave his real estate to them upon his death.

Thereafter, on 21 March 1959, Jim executed a will containing the following provision:

"Fourth: It is my opinion that \$16,000.00 is a fair market value of my real property lying in Steele Township, Rowan County, N. C. Since my daughter, Mildred Lyerly Rape and my son, Woodrow W. Lyerly have obligated themselves to care for my wife and my self during our lifetime, all of my real property, I give and bequeath to Mildred Lyerly Rape upon payment by her to the following: 1st. To my son, Woodrow W. Lyerly, the sum of \$6,000.00 2nd. To my son, Gray Lyerly the sum of \$1,000.00 3rd. To my daughter, Katherine Lyerly Mack the sum of \$1,000.00."

Jim named Basil and Woodrow executors and delivered the will to Basil for safekeeping. Basil placed the will in his safe deposit box where it remained until after Jim's death.

Thereafter, Mildred, Basil and their children lived with and cared for Jim and Pearl. Pearl was a very sickly woman and extremely temperamental, requiring a lot of attention and care. Jim was quite healthy until he had a heart attack in 1961. After that he did little work but continued to be very active in the community. Basil made many improvements to the homeplace and to the farm between 1959 and Jim's death in 1970. The homeplace was remodeled in 1959 and 1960, costing approximately \$6,000.00, which Basil paid.

In 1961, it was discovered that Mildred had breast cancer. Surgery was performed from which she recovered quickly. She continued to carry on the household functions, including cooking and caring for Jim and Pearl. Jim stated many times to different witnesses that he was well cared for by Basil, Mildred and the children before and after Mildred's surgery.

Following Jim's heart attack, Woodrow and Basil entered into a formal partnership agreement to farm together. The agreement contained a buy-sell provision by which one partner, upon proper notice, could either buy or sell his interest to the other partner.

After Mildred's surgery, she began teaching Caroline how to run a household. The other Rape children helped their father with the farming and attending to the needs of Jim and Pearl.

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Jim constantly bragged about the excellent treatment he received from the Rape children and how they cared for his every need.

Mildred died of cancer in 1965. After her death, in response to a question as to what Basil was going to do, Jim responded: "Oh, he can't leave. We have got an agreement. He's got to stay with us," and on another occasion, "... They will have to live here—live with us and take care of mama and me. We have papers drawn up to that effect." With respect to the treatment he and Pearl received after Mildred's death, Jim stated to a witness:

"He said that the Rape family waited on him and Miss Pearl just like they were children. That anything they wanted, they got. That the Rape family was very good to them. A lot of times when I would go over there, Basil would be cooking dinner and getting dinner ready or something like that or washing the dishes. He would just be busy all the time doing something. If he wasn't outside, he was inside waiting on them. I am talking about the time after Mildred died in 1965. From 1959, until Mildred's death, Basil was right there helping, but Mildred, she never did give up and she didn't go to bed. She waited on Miss Pearl and Mr. Jim and cooked for Basil and his family. After Mildred's death, Caroline took part. She was about thirteen or fourteen at her mother's death and she took right over doing the cooking, houseworking and waiting on Miss Pearl."

Many witnesses, including a brother, sister and nephew of Jim, and neighbors of both families, testified that Jim bragged to them up until his death of the excellent treatment that he was receiving. He never complained to anyone about his treatment.

Pearl died in 1966. In 1969, Basil bought Woodrow's interest in the partnership. Donald went off to college, but continued to help on the farm. Caroline entered college in 1969, but came home almost every weekend and helped around the house.

On 4 September 1969, Jim executed another will in which he revoked all prior wills, devised a major portion of his real estate to defendants and a minor portion to plaintiffs, and named his daughter, defendant Katherine L. Mack, executrix. The will contained a provision to the effect that if any beneficiary under the will instituted any action to set aside or change the effect of the will, all benefits in favor of such beneficiary would be revoked.

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The execution of the 1969 will was kept a secret, particularly as to Basil and plaintiffs, until after Jim's death on 23 November 1970 when the will was probated. Between 4 September 1969 and Jim's death, Basil made additional improvements to the farm including the construction of a trench silo. Basil and plaintiff Donald Rape continued to live on the farm and operate it after Jim's death.

Plaintiffs tendered the money stated in the agreement that Jim had with Mildred but the tender was refused by defendants. The money has been tendered to the court. Plaintiffs then brought this action seeking specific performance of the contract.

The following issues were submitted to the jury:

- (1) Did James Richard Lyerly enter into a contract to leave his real property by will to Mildred Lyerly Rape in return for care of himself and his wife during their lifetime and upon the condition that Woodrow W. Lyerly be paid the sum of \$6,000.00; Gray Lyerly the sum of \$1,000.00 and Katherine Mack the sum of \$1,000.00?
- (2) Did Mildred Lyerly Rape perform, during her lifetime her obligations as contemplated by the contract?
- (3) Following the death of Mildred Lyerly Rape and until the death of James Richard Lyerly and his wife, was care for James Richard Lyerly and his wife furnished by or on behalf of the plaintiffs as contemplated by the agreement, and did James Richard Lyerly accept such services in fulfillment of the said agreement?
- (4) Was this action instituted by the plaintiffs in good faith?

The jury answered all issues "YES" and from judgment predicated on the verdict in favor of plaintiffs, defendants appealed.

Kluttz and Hamlin, by Lewis P. Hamlin, Jr., and Richard R. Reamer, for the plaintiff appellee.

Collier, Harris, Homesley, Jones & Gaines, by Walter H. Jones, Jr., for the defendant appellants.

BRITT, Judge.

Defendants contend the court erred in failing to grant their motions to dismiss the action, for summary judgment, and for

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directed verdict. We will discuss some of the grounds argued by defendants in support of their motions.

At the outset, defendants argue that Basil is a necessary party to this action. While denying that he is a necessary party, plaintiffs have moved in this court that they be allowed to file a disclaimer of interest by Basil. We have allowed the motion and the disclaimer has been filed.

[1] The theory of plaintiffs' case is that their mother, Mildred, and Jim entered into a contract in 1959 whereby Mildred agreed to look after Jim and Pearl for the remainder of their lives and in return Jim agreed to convey by will certain real estate to Mildred. The first question that arises is whether the revoked will which Jim executed in 1959 and placed with Basil for safe-keeping provided a sufficient memorandum of the agreement to comply with the Statute of Frauds. We hold that it did.

The pertinent part of our Statute of Frauds, G.S. 22-2, provides that "(a)ll contracts to . . . convey any lands, tenements or hereditaments, or any interest in or concerning them, . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith" Plaintiffs introduced the 1959 will of Jim as evidence of the written agreement between the parties. The provision of the will critical to this case is the fourth article quoted above.

Our research has failed to reveal a case in which a North Carolina appellate court has held that a revoked will is a sufficient memorandum to satisfy the Statute of Frauds. However, our Supreme Court has held that a *joint will* between a husband and wife was a sufficient memorandum of the contract for the disposition of their estates to satisfy the Statute of Frauds. *Mansour v. Rabil*, 277 N.C. 364, 177 S.E. 2d 849 (1970); *Olive v. Biggs*, 6 N.C. App. 265, 170 S.E. 2d 181 (1969), *cause remanded* 276 N.C. 445, 173 S.E. 2d 301 (1970); *but see Hicks v. Hicks*, 13 N.C. App. 347, 185 S.E. 2d 430 (1971) in which the Court of Appeals held that a joint will which had been subsequently revoked was not sufficient to satisfy the Statute of Frauds. Underlying these decisions is the principle that the revoked will must state or make clear reference to the agreement so that the duties and considerations of the contracting parties is known. If there is no contractual language in the will, then it is insufficient to satisfy the Statute of Frauds. *Hicks v. Hicks*, *supra*.

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The Supreme Court was faced with the question in *McCraw v. Llewellyn*, 256 N.C. 213, 123 S.E. 2d 575, 94 A.L.R. 2d 914 (1962), but held that the revoked will in that case was insufficient for the following reasons (p. 217) :

The writing must show the promise or obligation which the complaining party seeks to enforce. (Citations omitted.)

"An aggrieved party may recover for the breach of a contract, made upon sufficient consideration, that the promisor will make him the beneficiary of a bequest or devise in his will, but such a contract must be established by the mode of proof legally permissible in establishing other contracts." (Citation omitted.)

"THE AGREEMENT MUST ADEQUATELY EXPRESS THE INTENT AND OBLIGATION OF THE PARTIES. Parol evidence cannot be received to supply anything which is wanting in the writing to make it the agreement on which the parties rely." (Emphasis added.) (Citations omitted.)

See 1 *Page on Wills* sec. 10.12 (Bowe-Parker rev. 1960) ; J. Webster, *Real Estate Law in North Carolina* sec. 119 (1971) ; 57 Am. Jur. *Wills* sec. 187 (1948) ; 94 C.J.S. *Wills* sec. 111 (b) (1956) ; Annot., 94 A.L.R. 2d 921 (1964).

Therefore, in order for Jim's 1959 will to be sufficient it must "adequately express the intent and obligation of the parties." We think the will does that. Jim clearly states the parties' obligations. Jim promises to leave Mildred "all of my property" in return for Mildred obligating herself to take care of Jim and Pearl and also to pay certain sums to his other children. This leaves no question as to what the obligations of the parties were. We hold that the 1959 revoked will satisfies the memorandum requirement of the Statute of Frauds.

[2] The next question that arises is whether Jim's legal obligation to devise the real estate terminated at the time of Mildred's death in 1965; or, whether Jim's failure to rescind within a reasonable time and his continuing to accept the services rendered by Basil and Mildred's children constituted full acquiescence on Jim's part, thereby making the children parties to the contract by substitution. We hold that the evidence was sufficient to support a jury finding that by Jim's acquiescence, the children became parties to the contract by substitution.

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No case is cited and our research has disclosed no precedent in this jurisdiction that provides clear direction. The nearest case in point appears to be *Siler v. Gray*, 86 N.C. 566 (1882): In *Siler*, the court held that the parents could not force the administrator of their deceased child's estate to care for them as the child had contracted to do because the agreement was a personal contract which died with the parties. However, the court held that the intention of the parties governs each case and there was no evidence in that case that the parties ever intended that there be a substitution of parties. In *Burch v. Bush*, 181 N.C. 125, 106 S.E. 489 (1921), Justice (later Chief Justice) Stacy stated that whether there is a personal contract depends upon the intention of the parties.

Our review of decisions from other jurisdictions discloses that the question has been answered favorably to plaintiffs in several cases. The case nearest in point is *Soper v. Galloway*, 129 Iowa 145, 105 N.W. 399 (1905), where the evidence tended to show: One C.V.A. entered into a contract with his sister, T.S., and her husband, G.W.S., whereby it was agreed that the sister and her husband would move onto and operate C.V.A.'s farm, and would board and care for C.V.A. during the remainder of his natural life; that at his death, and in consideration of such service, they would become the owners of the farm. The sister, her husband and two children (plaintiffs in the action for specific performance) moved onto the farm and otherwise proceeded to comply with the contract. Fourteen years later, the sister died and her husband and the children continued to care for C.V.A. The next year, the husband died, and the plaintiffs continued to care for C.V.A. who died two years later intestate. Plaintiffs claimed the farm as substituted parties to the original contract. The court at pages 147-8 states the following rule:

"It is a contention of defendants, made in argument, that the contract, if made, was purely personal in character, and for that reason terminated at once upon the death of the parent of plaintiffs. There is no merit in this contention. We need not determine what the rights of the parties would have been had (C.V.A.) refused to accept a continuation of service at the hands of plaintiffs. He did accept such service, and in view thereof, and of the relation of the parties, we think it must be said that within the understanding of each, such substituted performance was in compliance with the contract requirements, and to be followed by the same measure of rights which, had their death not inter-

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vened, would have accrued to the parents of plaintiffs. This conclusion has support in the following cases. (Citations omitted.)”

In the case of *Prater v. Prater*, 94 S.C. 267, 77 S.E. 936 (1913), the court, faced with a similar situation, stated at page 280: “If M. A. Prater did not intend that the agreement should continue in force, it was his duty within a reasonable time after Drayton Prater died, to give her notice of such intention. From August, when he died, until January, when Mary R. Prater left, was certainly an unreasonable time for giving the notice to her.”

[3] The rule to be gleaned from these two cases is: Parties can be substituted in a personal contract when (1) the parties do not object, and (2) fully acquiesce in accepting the services performed by the substituted party. If a party does object to substituted performance he must rescind within a reasonable time so as not to injure the substituted party. See also, 1 *Page on Wills* sec. 10.25 (Bowe-Parker rev. 1960); 57 Am. Jur. *Wills* sec. 175 (1948); 94 C.J.S. *Wills* sec. 117(d) (1956).

In the only case cited by defendants, *Bourget v. Monroe*, 58 Mich. 563, 25 N.W. 514 (1885), the facts are easily distinguishable from the facts in this case. In *Bourget*, the father immediately upon his daughter's death repudiated the contract and excluded the husband from the house.

[2] For the reasons stated, we hold that the evidence was sufficient to show that Jim, by accepting the services of Basil and the plaintiffs in the place of Mildred, effectively substituted them in the original contract to the end that they are now entitled to specific performance of that contract.

We have carefully considered the other contentions and assignments of error brought forward and argued in defendants' brief and find them to be without merit. We hold that the controversy was properly submitted to the jury on appropriate issues at a trial in which there was no prejudicial error.

No error.

Judge BAILEY concurs.

Judge HEDRICK dissents.

In re Campsites Unlimited

IN THE MATTER OF THE APPLICATION OF CAMPSITES
UNLIMITED, INC.

No. 7420SC678

(Filed 16 October 1974)

1. Counties § 5; Municipal Corporations § 30— zoning ordinance — good faith expenditures before passage

The developer of a lakeside campsite project did not act in bad faith in beginning work on the project with knowledge that a county zoning ordinance affecting the property was being contemplated where there was no evidence that the developer knew that the proposed use would be prohibited by the zoning ordinance, the specific zoning classification for the property having first been considered after the work was begun and only shortly before the ordinance was passed.

2. Counties § 5; Municipal Corporations § 30— zoning ordinance — substantial expenditures before passage

The developer of a campsite project made substantial expenditures on the project prior to enactment of a county zoning ordinance which would prohibit the project, notwithstanding the amount expended constitutes less than ten percent of the projected total cost of the project, where he had paid or become obligated to pay \$275,000 of which \$156,000 was for the land, and where roads had been staked off and graded, maps had been recorded, and substantial engineering and surveying services had been performed.

3. Counties § 5; Municipal Corporations § 30— zoning ordinance — nonconforming use — entire project

Although roads had been cut in only five of the eight sections of a campsite development at the time a county zoning ordinance prohibiting the project was passed, the entire development constituted a nonconforming use where the economic feasibility of the project depended on the development of the entire area and the primary reason for division of the property into eight sections was to facilitate a system for filing plats in the office of the register of deeds.

Judge VAUGHN dissents.

APPEAL by applicant from *Seay, Judge*, 4 February 1974 Session of STANLY County Superior Court. Heard in the Court of Appeals 19 September 1974.

This case arose by virtue of the application of Campsites Unlimited, Inc. (hereinafter Applicant), to the Stanly County Planning Administrator for permission to use its property as a nonconforming use under a Stanly County zoning ordinance. This ordinance was enacted on 16 April 1973 subsequent to the commencement of construction on a campsite project to be developed by the Applicant on Lake Tillery. The ordinance zoned

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the property of the Applicant R-20 which required, among other things, a 20,000 square foot lot size requirement. This destroyed the plans of Applicant for a campsite.

The application referred to was denied by the Planning Administrator, whereupon Applicant requested an appearance before the Board of Adjustment of Stanly County, (hereinafter Board). Applicant appeared before the Board and on 6 August 1973, the Board entered an order finding that Campsites had established a nonconforming use in five of eight sections into which the property had been divided, but that Applicant would have to comply with the minimum lot size requirement of the R-20 district.

Applicant petitioned the superior court for a writ of certiorari objecting to the record before the Board, contending generally that it was neither accurate nor complete. The superior court remanded the proceeding and ordered the Board to receive additional evidence to clarify the basis for the denial of the application. Notice was duly published and a hearing was held on 21 December 1973 in the Stanly County Courthouse.

The testimony at this hearing revealed that Campsites Unlimited, Inc., was chartered as a North Carolina corporation on 5 January 1973, all stock therein being owned by C. L. Darnley and his family. Prior to this in June 1972, Darnley began negotiating with a Mrs. Efird for the purchase of a 155-acre tract adjacent to Lake Tillery. This tract is now the subject of this appeal. In November, 1972, papers were signed in connection with the property. By deed dated 25 January 1973, Mrs. Efird conveyed the tract to Applicant for \$156,000.

Commencement of the development actually began in January, 1973, when Darnley secured the services of Wiggins-Rimer and Associates/Southeastern Surveys, professional engineers and surveyors from Durham. This company proceeded to make a perimeter survey of the entire property and a preliminary study of a central waste treatment facility for the campsite. Darnley expressed the desire to complete the project by March 1 to capitalize on the seasonal market for recreational lots of this type.

In February, Darnley contracted to have some sign printing done and arranged to convey all commercial rights in the project to Five Star Enterprises. An aerial survey of the prop-

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erty was made after which percolation tests were conducted by the Stanly County Health Department.

Around the first of March, Darnley entered a contract with a grading service to do the road and street grading on the project. On 4 March 1973, survey parties began staking out the streets. Woodcutters came right behind the survey party cutting the trees after which grading began on 15 March. This continued through the date of the enactment of the ordinance. Later in March, promotional literature was printed. At the end of March, the Applicant executed a deed conveying property to be used as a marina and restaurant.

Various other items were being taken care of during this period, among them the preparation of a disclosure report to the Department of Housing and Urban Development, and the negotiation of a lease for the use of lake front property owned by Carolina Power and Light Company.

On 16 April 1973, the County Commissioners enacted the first zoning ordinance in the history of Stanly County. It placed the Applicant's property in the R-20 classification which precluded its development as a campsite. As of that date, Applicant had expended or had become obligated to pay approximately \$275,000 in connection with the development. Of this, \$156,000 was for the property.

There was evidence that zoning had been considered in Stanly County since 1968. A planning administrator was not appointed until 6 July 1972. Prior to that time only a planning board existed. In May 1972 the County entered a contract with the Department of Natural and Economic Resources for assistance in preparing a comprehensive plan which eventually resulted in the 16 April 1973 ordinance.

There was evidence that the planning board was considering zoning in the county for some time before April 1973, but no specific zoning classification had been settled upon until after an informal courtesy hearing held 28 March 1973. There was no public notice of this hearing and Darnley did not attend or even know of it. At that hearing, a show of hands vote by citizens opposing the campsite project resulted in a motion adopting an R-20 classification for the campsite. Notice was immediately given of a public hearing to be conducted on 16 April 1973. At that time, the zoning ordinance in question was passed.

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On the above evidence, the Board of Adjustment, by order dated 30 January 1974, found that Campsites had failed to establish a vested right to carry on a nonconforming use of its land and ordered its application denied. Applicant excepted and objected whereupon the matter came on for hearing before the Stanly County Superior Court which treated the appeal as a writ of certiorari to review the record for alleged errors of law.

The superior court affirmed the foregoing order. The Applicant appealed.

Russell J. Hollers and John V. Hunter III for Applicant-appellant.

Brown, Brown & Brown by Richard L. Brown, Jr., for Stanly County.

Patterson and Doby by Henry C. Doby, Jr., for Protestant-appellees.

CAMPBELL, Judge.

[1] The appellant basically contends that at the time it knew or could have known of a proposed zoning ordinance affecting its land it had acquired a vested right to proceed with construction notwithstanding that the contemplated use would be nonconforming. The appellees contend that the appellant knew that proposed zoning was being contemplated and that this knowledge prevented the appellant from acting in good faith in reliance on the existing law.

The appellee Stanly County specifically relies on the "good faith" rule as stated in *Town of Hillsborough v. Smith*, 276 N.C. 48, 56, 170 S.E. 2d 904, 910 (1969), to-wit:

"The 'good faith' which is requisite under the rule of *Warner v. W & O, Inc.*, *supra*, is not present when the landowner, with knowledge that the adoption of a zoning ordinance is imminent and that, if adopted, it will forbid his proposed construction and use of the land, hastens, in a race with the town commissioners, to make expenditures or incur obligations before the town can take its contemplated action so as to avoid what would otherwise be the effect of the ordinance upon him." (Emphasis added.)

The appellees make a great deal of this language. Their reliance is unfounded. This is due to the fact that the rule requires

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knowledge on the part of a landowner that a zoning ordinance will prohibit the contemplated use to which he was putting his land.

In this case, there was evidence that zoning in Stanly County was being contemplated as early as 1968, but there is a marked absence of evidence indicating the particular type of zoning ordinance contemplated. At most there was ambiguity. The State planner from the Department of Natural and Economic Resources, who was assisting the County, was suggesting one thing, the planning board suggesting something else. This continued until 28 March 1973 when certain protestants at an informal courtesy hearing voiced objection to the proposed project. At that time, the planning board considered for the first time a specific zoning classification for the area in question. The appellant admitted to knowledge of zoning in general in Stanly County as early as the fall of 1972, but this is not knowledge that the zoning is imminent and that it would forbid the proposed use. Furthermore, it was not clear whether public notice was given for the courtesy hearing. In any event, the courtesy hearing was an informal county hearing which would not constitute legal notice to the appellant. It was uncontested that he was not present at the meeting and had no knowledge of it.

Therefore the finding by the Board of Adjustment and its affirmance by the superior court that the appellant was not acting in good faith prior to 16 April 1973, is unsupported by the evidence, is arbitrary and is in error as a matter of law.

[2] "To acquire [a] vested property right it is sufficient that, prior to the . . . enactment of the zoning ordinance and with the requisite good faith, he make a substantial beginning of construction and incur therein substantial expense." *Town of Hillsborough v. Smith, supra*, at 54, 170 S.E. 2d at 909. The appellees contend that the amounts expended constitute less than ten percent of the projected total cost of the development and that this is not a substantial expenditure in contemplation of the law. This is without merit. "[O]ne who, in good faith . . . makes expenditures or incurs contractual obligations, substantial in amount, incidental to or as part of the acquisition of the building site or the construction . . . may not be deprived of his right to continue such construction and use. . . ." *Town of Hillsborough v. Smith, supra*, at 55, 170 S.E. 2d at 909. (Emphasis added.) The record is replete with evidence of the con-

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struction begun and expenditures made by the appellant prior to the adoption of the ordinance on 16 April 1973. He had paid or had become obligated to pay approximately \$275,000 of which \$156,000 was for the land. Roads had been staked off and graded, supplies purchased, maps recorded, and substantial engineering and surveying services incurred. We find that the evidence in this case compels the conclusion as a matter of law that substantial expenditures had been incurred so as to qualify the project as a nonconforming use.

[3] The appellant also contends that should this Court find the development to be a nonconforming use, it should so find as to the entire development and not just sections one through five. It so happened that at the time the zoning ordinance intervened, the appellant had only cut roads in five of the eight sections. On this basis, the Board originally found a nonconforming use as to just those five sections. This was error. The evidence established that the economic feasibility of the campsite project depended implicitly on the development of the entire area in question. It further established that the primary reason for the division of the property into eight sections was merely to facilitate a legible, useful and recordable system for filing plats in the register of deeds office. There was work being continuously carried out in all sections of the project at the same time. The evidence compels a finding that this is not a section development and that the nonconforming use applies to the entire project area. *In re Tadlock*, 261 N.C. 120, 134 S.E. 2d 177 (1963).

The decision of a board of adjustment is final as to facts found provided there is some evidence to support such facts. The courts are empowered to review errors in law but not facts. Here there was a question of law. The Court can give relief against orders which are arbitrary, oppressive, or attended with manifest abuse of authority and ones which are unsupported by the evidence. See *Lee v. Board of Adjustment*, 226 N.C. 107, 37 S.E. 2d 128 (1946). The order of the Board of Adjustment as affirmed by the Stanly County Superior Court was arbitrary as not supported by the evidence and was in error as a matter of law.

Consequently, we reverse and remand the case to the Superior Court of Stanly County with the direction that the court enter judgment in this matter declaring the entire development in question to be a nonconforming use and further declaring the

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property free of the effect of the zoning ordinance of 16 April 1973.

Reversed and remanded.

Judge PARKER concurs.

Judge VAUGHN dissents.

HOWARD McGRADY AND HELEN P. McGRADY v. QUALITY MOTORS
OF ELKIN, INC., AND HOWARD GRATIS NORMAN

No. 7423SC688

(Filed 16 October 1974)

**1. Automobiles § 45; Evidence § 19— driving on wrong side of road—
point 500 feet from collision— remoteness**

In an action to recover for personal injuries and property damage sustained in a head-on collision with defendants' car-carrying tractor-trailer rig, the trial court did not err in the admission of testimony that at about 6:20 a.m. on the morning of the collision a witness met a tractor-trailer carrying cars which was being operated in the center of the road 500 feet from the point of the collision where the evidence showed the collision occurred about 6:30 a.m., since it may be inferred as the more reasonable probability (1) that the witness saw defendants' vehicle and (2) that the collision occurred after its uninterrupted travel from where the witness saw it to the point of the collision.

2. Appeal and Error § 30— necessity for motion to strike

Where there is no objection to the admission of testimony, a motion to strike is addressed to the discretion of the trial court.

3. Evidence § 50— medical testimony— response to hypothetical question— use of "possible"

In an action to recover for personal injuries sustained in a motor vehicle accident, the trial court did not err in refusing to strike a physician's response to a hypothetical question that it is "possible" that blows to plaintiff's knees could have damaged the cartilage under her kneecaps and produced the symptoms which she now manifests.

APPEAL by defendants from *Collier, Judge*, 25 March 1974 Session of Superior Court held in ALLEGHANY County. Heard in the Court of Appeals on 4 September 1974.

This is a civil action wherein plaintiffs seek to recover from the defendants damages for injury to person and property

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allegedly resulting from the negligence of the defendants in the operation of a motor vehicle on 21 January 1972.

The collision giving rise to this cause between the pickup truck operated by the plaintiff, Helen P. McGrady, and owned by her husband, Howard McGrady, and the tractor-trailer rig operated by the defendant, Howard Gratis Norman, and owned by the defendant, Quality Motors of Elkin, Inc., occurred approximately eight miles west of Sparta, North Carolina, on N. C. Highway 93, near the point where it intersects with Rural Paved Road 1334. The plaintiffs' vehicle was proceeding east and the defendants' vehicle was proceeding west on N. C. Highway 93 when they collided head-on near the intersection.

At the trial, both the plaintiffs' and the defendants' evidence tended to show that at the time of the collision the roads were wet and it was dark, foggy, and misty. Aside from this, the remaining evidence was conflicting as to exactly how the accident occurred. The plaintiffs' evidence tended to show that Mr. Norman was operating his vehicle partially in the wrong lane of traffic, whereas the defendants' evidence tended to show that the accident resulted from the McGrady truck skidding and sliding into the front of the defendants' truck as it rounded the sharp curve in the intersection.

The plaintiffs, over defendants' objection, introduced testimony of Herbert C. Jones that at about 6:20 a.m. on the morning of the accident he was driving his automobile east along N. C. Highway 93 at a point approximately 500 feet east of the intersection when he met a tractor-trailer rig (car carrying type) proceeding in a westerly direction in the center of N. C. Highway 93 and that he was crowded off the highway by the tractor-trailer.

Issues of negligence, contributory negligence, and damages were submitted to and answered by the jury in favor of the plaintiffs. From a judgment on the verdict that Mrs. McGrady recover \$2,150.00 for her personal injuries and that Mr. McGrady recover \$2,100.00 for the damage to his pickup truck, the defendants appealed.

Edmund I. Adams for plaintiff appellees.

Franklin Smith for defendant appellants.

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HEDRICK, Judge.

[1] By assignments of error 1 and 3, defendants contend the court erred in admitting the testimony of the witness Jones and in instructing the jury that the plaintiffs offered evidence tending to show that the witness Jones saw a tractor-trailer rig (car carrying type) being operated in the center of the road five hundred feet from the point of the collision.

If Jones saw the defendants' tractor-trailer rig and if the accident occurred after its uninterrupted travel from where it was when Jones last saw it to the scene of the collision in question, the testimony of Jones would not be inadmissible on account of remoteness or otherwise. Under the facts here, the distance between the point when last observed by Jones and the scene of the collision would bear on the weight rather than the competency of Jones' testimony. *Wilkerson v. Clark*, 264 N.C. 439, 141 S.E. 2d 884 (1965); *Honeycutt v. Strube*, 261 N.C. 59, 134 S.E. 2d 110 (1964).

"Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist." 31A C.J.S., *Evidence*, § 161, p. 440 (footnotes omitted).

The question here, as in *Wilkerson v. Clark*, *supra*, is whether there was evidence of facts and circumstances from which it may be inferred as the more reasonable probability (1) that Jones saw the defendants' vehicle and (2) that the collision occurred after its uninterrupted travel from where it was when Jones last saw it to the scene of the collision. "If so, it was for the jury to determine whether the evidence is sufficient to establish such facts and circumstances and to warrant findings in plaintiff's favor as to both propositions." *Wilkerson v. Clark*, *supra* at 442-443, 141 S.E. 2d at 887.

There is nothing in the record to establish precisely the time of the collision. The evidence in the record tends to show that the accident in question occurred at *about* 6:30 a.m. The defendant Norman was operating a tractor-trailer rig loaded with five automobiles. Jones testified that he saw a "tractor pulling an automobile trailer in which to carry automobiles on" on N. C. Highway 93 approximately 500 feet from the point of the collision at *about* 6:20 a.m. Jones testified that the vehicle he saw was being operated in the middle of the highway. Jones

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neither saw nor heard the collision nor did he learn of it until several hours later.

Our view is that the evidence of the facts and circumstances is sufficient to raise an inference that Jones saw the defendants' truck and that its travel was uninterrupted from where he last saw it to the point of the collision. Therefore, his testimony with respect thereto was admissible. Consequently, the court did not err in instructing the jury as it did with respect to such testimony.

[2] Assignments of error 2, 8 and 9 relate to the trial court's refusal to strike the testimony of Dr. Ashley and in recapitulating his testimony in the instructions to the jury. From the record, it appears that the motion to strike the testimony of Dr. Ashley was made at the same time as was the defendants' motion for a directed verdict. No objection was made to Dr. Ashley's testimony, which covers approximately three pages in the record. A motion to strike must be made immediately after the testimony objected to is given in order to preserve an exception to the admission of the evidence and, where there is no objection to the testimony, a motion to strike is addressed to the discretion of the trial court and its ruling thereon is not subject to review in the absence of abuse. 1 Strong, N. C. Index 2d, Appeal and Error, § 30, p. 165. Thus, it was not error for the court to deny the motion to strike this testimony nor was it error for the court to recapitulate his testimony in the instructions to the jury.

[3] Assignments of error 6, 7, 8 and 9 relate to the trial court's refusal to strike the testimony of Dr. Adams and in recapitulating his testimony in the instructions to the jury.

Dr. Richard W. Adams, a specialist in orthopedic surgery, testified that Dr. Ashley referred Mrs. McGrady to him and that he saw her on 9 August 1973. She gave him a history of having bruised her knees in an automobile accident on 21 January 1972. Mrs. McGrady told Dr. Adams that she "had trouble sitting and squatting and placing stress on the knees." Upon examination, Dr. Adams found that the patient had a "crepitation or a grinding sensation when the kneecap was pressed against the joint . . . there was a grinding sensation and there was pain." He diagnosed her condition as "chondromalacia of the patella. This means bad cartilage of the kneecap. In other words, the cartilage on the under surface of the kneecap had

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been damaged and had undergone degenerative changes. This is the reason for the grinding sensation that she has, the cartilage had roughened and that is the reason she had the discomfort in her knees."

After stating that he had an opinion, Dr. Adams was allowed to testify in considerable detail as to how long the condition he described with respect to the patient's knees would persist. In substance, it was his opinion that the condition with pain might persist for years, but that he could not say with any degree of certainty as to how long.

After giving the foregoing testimony, Dr. Adams was permitted over defendants' objection to answer the following hypothetical question:

"If the jury should find from the evidence and by its greater weight that Mrs. McGrady was driving a pickup truck which was involved in a head-on collision on the 21st day of January, 1972, that she received an injury to both knees by striking them on the dashboard or some other part of the inside of her truck, that she had never prior to that time had any injury or trouble with her knees, that a few weeks later she began to have pain in her knees and that she continued to experience pain in her knees until you examined her on August 9, 1973, do you have a professional medical opinion based on your expert medical knowledge and experience as to whether or not the chondromalacia condition you found could or might have resulted from the injury to her knees she received in that head-on collision?"

After stating that he did have an opinion, he responded:

"It is certainly possible that the blows to her knees could have damaged the cartilage on the under surface of the kneecap and this could have led then to deterioration of the cartilage, producing the symptoms which she now manifests."

Defendant contends the court erred in denying their motion to strike Dr. Adams' response to the hypothetical question. Our concern with respect to the court's refusal to strike Dr. Adams' response to the hypothetical question is whether Dr. Adams' opinion was based on mere speculation or conjecture rather than on reasonable scientific probabilities.

"Expert opinion testimony may be given in terms of an opinion that something might, could, or would produce

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a certain result. Opinion testimony of this nature is said to be admitted into evidence on the theory that an expert witness' view as to probabilities is often helpful in the determination of questions involving matters of science or technical or skilled knowledge. * * *

An expert witness should not be barred from expressing his opinion merely because he is not willing to state his conclusion with absolute certainty. But an expert's opinion, if not stated in terms of the certain, must at least be stated in terms of the probable, and not merely of the possible. * * *

The expert is entitled to give his best judgment or opinion on the matter under inquiry, but not to give answers which are mere guesses or to give an opinion which is nothing more than naked or baseless conjecture. While an expert may testify to general scientific facts or doctrines which are pertinent to elucidate the facts in issue, he cannot testify either as to general theories which have only a remote and conjectural application to the facts of the case, or as to general conditions or occurrences speculatively connected with the issues at bar. Under particular circumstances, however, in the discretion of the trial court, more or less conjectural opinions have been admitted, especially in cases calling for expert medical testimony." 31 Am. Jur. 2d, *Expert and Opinion Evidence*, § 44, pp. 548-549 (footnotes omitted).

When Dr. Adams' response to the hypothetical question is considered in the light of all his testimony, it is clear that his opinion was based on reasonable probabilities and not mere conjecture. In our opinion, his use of the word "possible" does not render his testimony inadmissible. Under the circumstances of this case, we find no abuse of discretion or prejudicial error upon Judge Collier's refusal to strike Dr. Adams' response to the hypothetical question. Nor is there any merit in defendant's contention that the court erred in recapitulating to the jury what Dr. Adams' testimony tended to show. These assignments of error are overruled.

In the trial in the superior court, we find

No error.

Judges BRITT and BAILEY concur.

State v. Wortham

STATE OF NORTH CAROLINA v. COLONEL LEE WORTHAM**No. 749SC685****(Filed 16 October 1974)****1. Criminal Law § 87— leading questions — allowance not prejudicial**

The trial court in this armed robbery case did not abuse its discretion in allowing the district attorney to ask three questions which, if perhaps leading, were all clearly designed to facilitate the hearing.

2. Criminal Law § 88— recross-examination not permitted — no error

The trial court did not err in refusing to allow defendant to recross-examine a State's witness concerning testimony elicited on redirect examination where defendant's attempted recross-examination did not relate to any matter not touched upon in either the direct or cross-examination of the witness.

3. Criminal Law § 99— clarification of question by judge — no expression of opinion

The trial court did not express an opinion regarding the credibility of a defense witness where the witness, asked of what he had been convicted, replied, "like spending time in an institution of any kind?" and the trial judge answered, "no, convicted is what he asked you, including payoffs."

4. Criminal Law §§ 162, 169— failure to make timely objection, motion to strike

Defendant was not prejudiced where the trial court allowed a prosecution witness to recount a statement by a codefendant made in defendant's absence, since the witness was allowed to testify in response to several questions concerning the statement before defendant made any objection and defendant made no motion to strike the witness's answers; furthermore, even if defendant did not waive any rights by his failure to make timely objections and motion to strike, admission of the testimony concerning his codefendant's statement was at most harmless error beyond any reasonable doubt.

5. Criminal Law § 102— jury argument of district attorney — propriety

Defendant failed to show any impropriety in the district attorney's use of the words "thieves," "rogues," and "scoundrels" when referring to defendants in his jury argument.

APPEAL by defendant from *Bailey, Judge*, 25 March 1974 Criminal Session of Superior Court held in GRANVILLE County.

Defendant was indicted for the armed robbery of Jim Hobgood and pled not guilty.

Evidence for the State tended to show: On 16 January 1974 Jim Hobgood operated the Buy Quick Food Mart in Oxford. On that date defendant, accompanied in his car by James Royster,

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Lewis Royster, and Dan Moss, drove around the town of Oxford, stopping at several small grocery stores with the idea of "getting some money." The other stores did not seem "right," according to the testimony of James Royster, and at approximately 10:30 p.m. defendant and his passengers stopped at the Buy Quick Food Mart. James Royster and Lewis Royster went inside, Lewis Royster having previously asked for and obtained a gun carried by Dan Moss. The two Roysters spent about five minutes going in and out of the store, whereupon defendant came up to them and asked them what was wrong. The Roysters reentered the store, followed shortly by defendant. Defendant was in the process of purchasing a soda and a pack of cigarettes when Lewis Royster pointed a gun in Hobgood's face and shouted, "This is it . . . up with some money." The manager and the other customers were told to lie on the floor, James took over \$320.00 from the cash register, and Lewis, as he left, fired the gun at the ceiling. Defendant meanwhile had left the store and pulled his car around on a side street, where he waited with the motor running. The Roysters got into the car and all four went to James Royster's house, where they divided the money.

Defendant's evidence tended to show: On 16 January 1974 at approximately 10:00 p.m. he drove over to Otis Royster's house to play cards. Several people were there drinking and talking, including Dan Moss, whom defendant knew, and Lewis Royster and James Royster, whom defendant did not know but whose names he learned the next day. James, Lewis, and a third person, unfamiliar to defendant, asked him to drive them to the Buy Quick to purchase a bottle of wine. During the drive Lewis Royster, who was wearing an "afro" wig, talked about robbing the store. James and the third person agreed to the idea, but defendant testified that he paid no attention to this talk. After parking in front of the store, defendant walked over to the side of the store to talk to some girls he knew while Lewis and James went inside. Defendant then went into the store and was at the counter purchasing a soda and a pack of cigarettes when Lewis pushed him aside, stuck a gun in the store manager's face, and ordered everyone to lie down. Defendant slowly backed out of the store and told the third person, who had remained on the sidewalk in front of the store, that those "fools" were robbing the place. The third person stated that he knew that, pulled a gun on defendant and he and defendant got in the car and pulled around on a side street, where they waited for the Roysters. After the Roysters got in the car, defendant

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drove out in the country to a deserted intersection where his passengers got out. The next morning, after he finished working, defendant went to the police station and told of the robbery. Defendant stated that he was 19 years old and had never been convicted of an offense.

The jury found defendant guilty as charged, and from judgment imposing a prison sentence of not less than 25 nor more than 30 years, defendant appealed.

Attorney General James H. Carson, Jr., by Assistant Attorney General Ralf F. Haskell for the State.

Watkins, Edmundson & Wilkinson by C. W. Wilkinson, Jr., for defendant appellant.

PARKER, Judge.

[1] Defendant initially assigns error to the trial court's allowing the district attorney to ask what the defendant contends were leading questions. Whether to permit counsel to ask leading questions is a matter within the sound discretion of the trial judge, and his exercise of that discretion will not be disturbed on appeal absent a showing of abuse. *State v. Peele*, 281 N.C. 253, 188 S.E. 2d 326 (1972); *State v. Pearson*, 258 N.C. 188, 128 S.E. 2d 251 (1962). Examination of the record discloses that defendant's first assignment of error is based upon only three questions which, if perhaps leading, were all clearly designed to facilitate the hearing. In permitting these questions, no abuse of the trial judge's discretion has been shown.

[2] Nor did the trial court err, as defendant urges, in not allowing him to recross-examine a State's witness concerning testimony elicited on redirect examination. "After a witness has been cross-examined and re-examined, it is in the discretion of the trial judge to permit or refuse a second cross-examination, and counsel cannot demand it as a right." 1 Stansbury's N. C. Evidence (Brandis Revision) § 36, p. 109. We note here that the record does not disclose either what specific questions defendant attempted to ask or what the answers to those questions would have been. The record contains only the statement that defendant's attorney "attempted to recross-examine the witness as to Colonel Lee Wortham's statement as to why he drove the other suspects off." Examination discloses that defendant's attorney had fully and fairly cross-examined the witness, who testified that defendant had stated that his reason for driving

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the participants away from the scene of the robbery was that he, the defendant, was "scared of them," and defendant's attempted recross-examination did not relate to any matter not touched upon in either the direct or cross-examination of the witness. Defendant's constitutional right to confront the witnesses against him through cross-examination was in no way impaired. Defendant's assignment of error on this point is overruled.

[3] Defendant next contends that the trial court impermissibly expressed an opinion regarding the credibility of a defense witness. The witness, asked of what he had been convicted, replied, "like spending time in an institution of any kind?" The trial judge then stated to the witness, "no, convicted is what he asked you, including payoffs." While the court's attempt to clarify the question was perhaps inartfully worded, we do not agree that the natural inference of the court's statement was that the witness had been "paid off" to testify in other trials. The more reasonable conclusion to be drawn from the statement was that the trial judge was attempting to distinguish between convictions which resulted in the imposition of an active sentence and those where the judgment required only payment of a fine. We find no reversible error in the statement made by the judge.

[4] Defendant's next assignment of error is that the trial court erred in allowing a prosecution witness to recount a statement by Dan Moss, a codefendant at this trial, made in defendant's absence. The record shows:

"Mr. Momier [the witness] said he was present when they arrested Dan Moss. He stated that Mr. Moss was warned of his constitutional rights. He stated that Dan Moss made the statement that he was on the car with Colonel Wortham and the two Roysters on the night before the robbery and that he did not commit the robbery.

"At this point, the solicitor asked the following question:

" 'Mr. Momier, this was on the night before the robbery or on the night of the robbery?'

"Both the defendant Wortham and the defendant Moss objected.

"The objection was overruled by the court.

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"The defendant Wortham excepted.

"EXCEPTION No. 7.

"Answer to this question, 'It was on the night of the robbery.'"

Defendant on appeal contends implicitly that his objection, noted in the portion of the record quoted above, was addressed to the entire testimony relating to Moss's statement. The record indicates to us, however, that the witness was allowed to testify in response to several questions concerning the statement of Moss before any objection was made. Furthermore, no motion was made by defendant to strike the witness's answers to previous questions. An objection to incompetent evidence ordinarily must be made as soon as the complaining party has the opportunity to learn that the evidence is objectionable, and by failing to object in apt time the party waives the objection. 1 Stansbury's N. C. Evidence (Brandis Revision) § 27. Although Moss's statement to the officers was not a confession, it did contradict defendant's own testimony that Moss was not one of the three passengers in his car on the night of the robbery. As a result it prejudiced defendant's credibility rather than linked him to the crime. Moss did not testify, and evidence as to his extrajudicial statement should have been excluded had timely objection been made. *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968); *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968). Here, no timely objection was made. Moreover, even if it be considered that defendant did not waive any rights by his failure to make timely objections and motion to strike, admission of the testimony concerning his codefendant's statement was at most harmless error beyond any reasonable doubt. The overwhelming nature of the properly admitted evidence establishing defendant's guilt simply leaves no reasonable possibility that admission of the testimony as to Moss's statement could have played any part in defendant's conviction. Where, as here, the error complained of could not possibly have influenced the verdict, a new trial will not be awarded. *State v. Knight*, 282 N.C. 220, 192 S.E. 2d 283 (1972); *State v. Gibson*, 18 N.C. App. 305, 196 S.E. 2d 564 (1973).

[5] Addressing ourselves to defendant's remaining assignments of error, we find nothing sufficient to warrant granting a new trial. The record discloses no occurrence at trial that would support a finding that the trial judge abused his discretion in

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not granting a mistrial. Finally, with respect to the asserted impropriety of certain remarks made by the district attorney during argument to the jury to the effect that defendants were "thieves," "rogues" and "scoundrels," the record does not show the context within which such remarks were made, and there has been no showing that any impropriety in the district attorney's employing such epithets was sufficient to require another trial.

In defendant's trial and the judgment appealed from we find

No error.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. MATTHEW DAYE

No. 7414SC604

(Filed 16 October 1974)

1. Criminal Law § 107; Forgery § 2— charge of uttering forged check — proof of uttering check with forged endorsement — variance

Defendant's motion for nonsuit based on the fatal variance between allegations in the indictment and proof at the trial should have been granted where the bill of indictment charged him with uttering a forged check, but the evidence offered at trial tended to show that the defendant uttered a check with a forged endorsement. G.S. 14-120.

2. Indictment and Warrant § 9— statutory offense — charge in words of statute

Generally an indictment for a statutory offense is sufficient if the indictment is framed, either literally or substantially, in the words of the statute; however, where the words of the statute are insufficient to apprise the accused of the charge against him, the indictment must be supplemented so that there can be no doubt about the specific offense charged.

3. Forgery § 2— uttering instrument with forged endorsement — sufficiency of indictment

In order for a bill of indictment sufficiently to charge the offense of uttering an instrument with a forged endorsement, the instrument or a copy should be attached, or the bill itself should specifically describe the instrument; further, the bill should allege that the endorsement was forged and that the accused knowingly uttered the instrument with the forged endorsement, and it should allege the manner in which the accused uttered it.

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APPEAL by defendant from *Chess, S. J.*, 25 March 1974 Session of Superior Court held in DURHAM County. Heard in the Court of Appeals 23 September 1974.

Defendant was charged in a bill of indictment with uttering a forged paper, a check, in violation of G.S. 14-120. A plea of not guilty was entered, and a verdict of guilty as charged was returned. From an active sentence of eighteen months imposed thereon, the defendant gave notice of appeal.

The State's evidence showed that on 9 July 1973 the defendant visited Vernon Respass at Duke Hospital. Respass had been hospitalized for treatment of a gunshot wound, and, prior to his hospitalization, had been living with the defendant and his family, paying the defendant \$20.00 a week for rent. Both the defendant and Respass worked for Carolina Transfer and Storage. Respass testified that he asked the defendant if he (defendant) had his (Respass') paycheck. The defendant stated that Respass' check was in his car. Respass asked the defendant to get the check so that he could endorse it and have the defendant buy him some clothing with the proceeds. Respass testified that the defendant left to get the check, but never returned. Hilda Sauls, a teller at Central Carolina Bank, testified that the defendant cashed Respass' check at the bank. When she later checked the endorsement, she stated that she realized that it was not the endorsement of Vernon Respass. Upon contacting Respass at the hospital, she was told that the defendant had never delivered the check to Respass.

The defendant's evidence showed that Respass owed the defendant \$55.00. The defendant testified that Respass asked him to cash the check and bring him pajamas, bedroom shoes, and wine. The defendant stated that he followed Respass' instructions and cashed the check after writing Respass' name on the back. He then bought pajamas and bedroom shoes and delivered them to Respass at the hospital. The defendant testified that he kept \$55.00 as repayment for his loan; with the remainder he purchased the pajamas and shoes, returning the balance, about \$32.00, to Respass. The defendant offered two other witnesses who corroborated his testimony.

Attorney General Carson, by Assistant Attorney General Sloan, for the State.

Loflin, Anderson and Loflin, by Ann F. Loflin, for the defendant.

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BROCK, Chief Judge.

[1] Defendant contends that the trial court committed error when it failed to grant defendant's motion for nonsuit at the conclusion of all the evidence due to fatal variance between the allegations of the indictment and the proof offered at trial. The indictment, as it appears in the record on appeal, charges:

"That Matthew Daye late of the County of Durham on the 9th day of July 1973 with force and arms, at and in the County aforesaid, did unlawfully, wilfully and feloniously utter as true to Central Carolina Bank and Trust Company, Durham, North Carolina a forged check drawn on the Wachovia Bank & Trust Company, NA, an incorporated Bank of North Carolina in the amount of \$102.27 payable to one Vernon Respass, Jr., and dated July 4, 1973. The defendant acted for the sake of gain and to defraud Central Carolina Bank and Trust Company, Wellons Village, Durham, North Carolina and Vernon Respass, Jr., and with the knowledge that the instrument which was capable of effecting fraud was forged, against the form of the statute in such case made and provided and against the peace and dignity of the State."

It is apparent that the bill of indictment charges the defendant with the crime of uttering a forged check. Yet the evidence tends to show that the drawer, the drawee, the payee, the date, and the amount are perfectly valid. The evidence offered at trial tended to show that the defendant uttered the check with the *forged endorsement* of Vernon Respass, the payee. This is an act wholly different from the act of uttering a forged paper. The first sentence of G.S. 14-120 makes it illegal to utter a forged paper; the second sentence of G.S. 14-120 makes it illegal to utter an instrument with a forged endorsement. The offenses are separate and distinct felonies.

"Where there is a fatal variance, it may be taken advantage of by motion for judgment as of nonsuit. *State v. Cooper*, 275 N.C. 283, 167 S.E. 2d 266; *State v. Kimball*, 261 N.C. 582, 135 S.E. 2d 568; *State v. Hicks*, 233 N.C. 31, 62 S.E. 2d 497. It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. The allegations and the proof must correspond. *State v. White*, 3 N.C. App. 31, 164 S.E. 2d 36; *State v. Watson*, 272 N.C. 526, 158 S.E. 2d 334." *State v. Muskelly*, 6 N.C. App. 174, 176, 169 S.E. 2d 530.

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The trial court should have granted the defendant's motion for nonsuit.

Although the defendant's first contention is dispositive of his case on appeal, we believe that the defendant's second contention has merit and warrants consideration. The defendant contends that the indictment, as framed, is insufficient in that it neither sets out the check as an attachment nor describes the check in full and sufficient detail.

[2] An indictment must allege all the essential elements of the offense with sufficient certainty so as to (1) identify the offense, (2) protect the accused from being twice put in jeopardy for the same offense, (3) enable the accused to prepare for trial, and (4) support judgment upon conviction or plea. *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897, *cert. denied*, 403 U.S. 940, 29 L.Ed. 2d 719, 91 S.Ct. 2258. Generally an indictment for a statutory offense is sufficient if the indictment is framed, either literally or substantially, in the words of the statute. Where the words of the statute are insufficient to apprise the accused of the charge against him, the indictment must be supplemented so that there can be no doubt about the specific offense charged. *State v. Hord*, 264 N.C. 149, 141 S.E. 2d 241. Although the indictment in the case at bar complies with the words of the first sentence of G.S. 14-120, in order to properly charge that offense, the indictment should have been more specific. In *State v. Able*, 11 N.C. App. 141, 180 S.E. 2d 333, this Court held that an indictment for uttering a forged check was insufficient in that it failed to attach the forged check. The Court said that where the indictment contained an exact description or a copy of the check, or the check itself was attached to the indictment and the false and fraudulent nature appeared on its face, then the indictment would constitute a sufficient indictment. Where neither a check nor a copy of the check is attached to the bill of indictment, and the indictment is not otherwise sufficiently descriptive, then the indictment must fail for want of specificity. In *State v. Moffit*, 9 N.C. App. 694, 177 S.E. 2d 324, this Court noted that a bill of indictment for forgery was insufficient when it contained none of the words allegedly forged by the defendant. Furthermore this Court has held that an indictment for the forgery of a money order was insufficient where the indictment failed to allege how the money order was changed, altered, or defaced. *State v. Cross*, 5 N.C. App. 217, 167 S.E. 2d 868. In *State v. Cov-*

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ington, 94 N.C. 913, 55 A.R. 650 (1886), the Supreme Court, in dealing with a charge of forgery, stated:

“If such tendency and sufficiency of the instrument appear upon its face, it will only be necessary to aver its false and fraudulent nature, setting forth an exact copy of it in the indictment. If, however, these do not appear, but there are extraneous facts that make the instrument have such tendency, and therefore, the subject of forgery, those facts must be averred in connection with it in such apt way, as will make the tendency appear. This is necessary, because the Court must see that the complete offence is charged.”

Although these cases do not deal with the offense of uttering an instrument with a forged endorsement, as should have been charged in the case at bar, we believe that their principles are applicable.

[3] In order for a bill of indictment to sufficiently charge the offense of uttering an instrument with a forged endorsement, the instrument or a copy should be attached, or the bill itself should specifically describe the instrument. Further the bill should allege, *inter alia*, that the endorsement was forged and that the accused knowingly uttered the instrument with the forged endorsement. It should also allege the manner in which the accused uttered it.

The defendant's motion to dismiss for fatal variance should have been allowed. The State may, if it elects, bring defendant to trial upon a proper bill of indictment charging defendant with uttering a check with a forged endorsement.

Action dismissed.

Judges PARKER and MARTIN concur.

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GRACE C. FINLEY v. ELIZABETH F. WILLIAMS, ADMINISTRATRIX,
d.b.n. OF THE ESTATE OF MANSFIELD FERGUSON, DECEASED

ELIZABETH F. WILLIAMS, INDIVIDUALLY AND AS ADMINISTRATRIX,
d.b.n. OF THE ESTATE OF MANSFIELD FERGUSON, DECEASED v.
GRACE FINLEY

No. 7423DC711

(Filed 16 October 1974)

Rules of Civil Procedure § 52— failure of trial court to find facts and state conclusions of law

In an action by administratrix to recover from defendant certain shares of stock allegedly owned by intestate at the time of his death and damages for their wrongful conversion, the trial court's finding that it was impossible to determine from the evidence presented the nature of the transactions between intestate and defendant and that upon the facts and the law the parties had shown no right to relief *inter se* was not sufficient to satisfy the requirements of G.S. 1A-1, Rule 52(a) (1) that the court find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

APPEAL by plaintiff from *Osborne, Judge*, 8 April 1974 Session of District Court held in WILKES County. Heard in the Court of Appeals on 4 September 1974.

These civil actions were consolidated for trial before the judge without a jury. In case No. 73CvD1328, the plaintiff, Grace Finley, seeks to recover \$2,940.00 from the estate of Mansfield Ferguson for money allegedly loaned to Mansfield Ferguson during his lifetime. No appeal was taken from the judgment for the defendant. In case No. 73CvS0963, the plaintiff, Elizabeth F. Williams, individually and as administratrix of the estate of Mansfield Ferguson, seeks to recover from the defendant, Grace Finley, certain shares of stock allegedly owned by Mansfield Ferguson at the time of his death and damages for their wrongful conversion.

Since case No. 73CvD1328 is not before us, all references made herein to plaintiff, defendant, Finley, and Ferguson (unless otherwise specified) relate to case No. 73CvS0963.

In her complaint, the plaintiff alleged that Mansfield Ferguson died intestate on 7 March 1972 and that Elizabeth F. Williams is the duly appointed and acting administratrix of

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his estate. The plaintiff alleged that at the time of his death Mansfield Ferguson was the owner of 363 shares of the common stock of the Sturdivant Life Insurance Company and that at the time of his death he was in possession of the stock certificate for said shares. The plaintiff further alleged that the defendant "wrongfully and with intent to defraud" converted said shares of stock into her own name and that subsequent thereto the stock was converted into United North Carolina Industries, Incorporated, stock.

The defendant filed answer admitting that Williams was the duly appointed and acting administratrix of the estate of Mansfield Ferguson and denied all the other material allegations of the complaint. In a further answer and defense, the defendant alleged that the 363 shares of the common stock of Sturdivant Life Insurance Company referred to in the complaint had been assigned to her by Ferguson prior to his death. Finley filed a counterclaim against Williams individually for \$400. In a reply, Williams admitted that she was indebted to Finley in the amount of \$330.

At the trial, Finley offered evidence tending to show that on 26 March 1971, Ferguson signed a paper writing (Exhibit 1) which reads as follows:

"I, Mansfield Ferguson acknowledge I owe Mrs. T. A. Finley the sum of 2000.00 dollars & 200.00 loan at N. Wilkesboro bank which she & Mr. Finley cosigned—Stock of Sturdivant Life Insurance as security. In case of any settlement of my property \$2,200.00 & \$250.00 fee for Mr. Bill Mittchell is to be paid before any other settlements are made. Including interest on all checks.

Signed by /s/ MANSFIELD FERGUSON
this March 26, 1971.

W.T. s/ C M HALL"

Finley also offered evidence tending to show that Ferguson signed the following paper writing (Exhibit 2, not dated), which reads as follows:

"FOR VALUE RECEIVED Six Hundred & fifty 50/100—
hereby sell, assign and transfer unto GRACE C.
FINLEY ++THREE HUNDRED SIXTY-THREE++ (363) Shares
of the Capital Stock of the STURDIVANT LIFE

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INSURANCE COMPANY standing in My name on the books of said COMPANY represented by Certificate No. 001350034311

CO 325
5347

herewith and do hereby irrevocably constitute and appoint _____ attorney to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated _____

s/ MANSFIELD FERGUSON

IN PRESENCE OF /s/ T. A. FINLEY”

Williams offered evidence tending to show the following: Mansfield Ferguson, brother of Elizabeth F. Williams, died on 7 March 1972. Before his death, Mansfield Ferguson worked for about three years for Mr. and Mrs. Finley. Mrs. Finley, shortly after Ferguson's death, qualified as administratrix of his estate. She later resigned as such administratrix and the plaintiff subsequently qualified as administratrix of her brother's estate. As administratrix, Finley filed a financial report in the office of the clerk of superior court. This report shows no payment of any indebtedness evidenced by Exhibit 1 nor does it show any receipt or disposition of 363 shares of the common stock of Sturdivant Life Insurance Company. Williams testified that while Finley was acting as administratrix of the estate she saw a stock certificate in Finley's home in Ferguson's name for 363 shares of stock of the Sturdivant Life Insurance Company. Williams further testified that she has never obtained possession of the 363 shares of Sturdivant Life Insurance Company stock.

Mrs. Manie Beshears testified that she was employed by Sturdivant Life Insurance Company as Executive Secretary until 28 February 1972. She "looked after all the stock." She knew Mrs. Finley and Mansfield Ferguson. Sometime prior to Ferguson's death, Mrs. Finley went to her office and told her Ferguson owed her some money. Mrs. Finley said that she wanted to hold Ferguson's Studivant Life Insurance stock as collateral. Mrs. Beshears testified that she kept a pad of forms on her desk which she called "collaterals". She described a "collateral" as "a piece of paper I kept on my desk if people wanted to hold stock for money borrowed. Yes, sir, for security." She filled

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out one of these forms for Mrs. Finley. She identified Exhibit 2 as a "collateral". Mrs. Beshears never saw Ferguson sign the form she filled out for Finley.

At the conclusion of the presentation of the evidence, the trial judge, addressing himself to motions for involuntary dismissal made by the parties under G.S. 1A-1, Rule 41(b) to all the claims in the two cases (with the exception of Finley's counterclaim against Williams), made the following finding and conclusion:

"That it is impossible for the court to determine from the evidence presented the nature of the transactions between the said Grace Finley and Mansfield Ferguson and that upon the facts and the law said parties have shown no right to relief *inter se*;"

The court entered a judgment that Finley recover \$330 on her counterclaim against Williams individually. From a judgment dismissing the claim of Williams individually and as administratrix of the estate of Ferguson against Finley, plaintiff appealed.

Brewer & Bryan by Joe O. Brewer and Larry S. Moore for plaintiff appellant.

Eric Davis for defendant appellee.

HEDRICK, Judge.

No contention is made on this appeal with respect to the judgment awarding Finley \$330 on her counterclaim.

The plaintiff contends the trial court erred in failing to find the facts specially and state separately its conclusions of law as required by G.S. 1A-1, Rule 52(a) (1) and in allowing the defendant's motion for an involuntary dismissal pursuant to Rule 41(b).

While the judgment entered appears to be an involuntary dismissal of plaintiff's claim for the wrongful conversion of Ferguson's stock, it is clear that Rule 41(b) has no application in this case since the court obviously heard both the plaintiff's (Williams) and the defendant's (Finley) evidence with respect to the controversy. Since the case was heard by the court without a jury, it was incumbent upon it to "find the facts specially and state separately its conclusions of law thereon and direct the

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entry of the appropriate judgment" as provided by Rule 52 (a) (1).

The pleadings and the evidence raise the issue of whether the defendant wrongfully converted the 363 shares of stock owned by Ferguson prior to his death. It was the duty of the trial judge to answer this issue by making findings of fact from the evidence and applying the appropriate principles of law. His finding "[t]hat it is impossible for the court to determine from the evidence presented the nature of the transactions between the said Grace Finley and Mansfield Ferguson and that upon the facts and the law said parties have shown no right to relief *inter se*," in our opinion, is not sufficient to satisfy the requirements of Rule 52 (a) (1).

There is sufficient evidence in this record to support material findings of fact which will determine the issues between the parties. Thus, that portion of the judgment entered relating to the plaintiff's claim for wrongful conversion of the stock must be vacated, and the case is remanded to the district court for the judge to make findings of fact from the record and enter the appropriate judgment. The portion of the judgment that the defendant recover \$330 on her counterclaim is affirmed.

Affirmed in part; vacated and remanded in part.

Judges BRITT and BAILEY concur.

DUKE POWER COMPANY v. DAN R. BUSICK AND WIFE, RUBY C. BUSICK, N. D. McNAIRY, TRUSTEE FOR GRAHAM PRODUCTION CREDIT ASSOCIATION, AND GRAHAM PRODUCTION CREDIT ASSOCIATION

No. 7418SC691

(Filed 16 October 1974)

1. Eminent Domain § 7— maps — admissibility for illustration

The trial court in a proceeding to condemn an easement did not err in admitting evidence from certain maps where the court adequately instructed the jury as to inaccuracies in the maps and told the jury that the maps were introduced solely for the purpose of illustrating testimony of the witnesses.

2. Eminent Domain § 6— land value — difference between time of purchase and time of condemnation

In a proceeding to condemn an easement over respondents' land, finding by the trial judge that there had been a significant change in

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the value of the land in the area between the time respondents purchased their parcel and petitioner sought to condemn the easement because of zoning changes was not supported by the evidence, and the trial court erred in disallowing evidence showing what respondents paid for the parcel not more than fifteen months before the date of the taking.

3. Eminent Domain § 6; Trial § 10— land value — expression of opinion by trial judge

Trial court's colloquy with a witness whose qualifications to testify as to the value of the land in question were minimal strengthened the witness's opinion as to the damage to respondents' land to the prejudice of petitioner.

APPEAL by petitioner from *Kivett, Judge*, 4 February 1974 Session of Superior Court held in GUILFORD County.

This special proceeding was instituted by petitioner to condemn an easement across a 112-acre tract of land belonging to respondents in Monroe Township, Guilford County. All issues raised by the pleadings were determined by consent order except the issue of just compensation to respondents.

At trial, respondents presented evidence tending to show damage between \$78,643 and \$82,720. Petitioner presented evidence tending to show damage between \$15,275 and \$16,300. A jury assessed the damage at \$46,000, and from judgment predicated on the verdict, petitioner appealed.

Adams, Kleemeier, Hagan, Hannah & Fouts, by M. Jay DeVaney, for petitioner appellant.

Dees, Johnson, Tart, Giles & Tedder, by Charles R. Tedder, for defendant appellees.

BRITT, Judge.

[1] By its first and second assignments of error, petitioner contends the trial court erred in admitting evidence from certain maps, contending, among other things, that the maps were inaccurate and not properly authenticated. We find no merit in these assignments. The trial judge adequately instructed the jury as to inaccuracies in the map and that the maps were introduced solely for the purpose of illustrating testimony of the witnesses.

[2] By its assignments of error three and four, petitioner contends that the court erred in denying petitioner the right to cross-examine respondent landowner with regard to the purchase

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price of a portion of the land included in the 112-acre tract. We think this contention has merit.

In *Shopping Center v. Highway Commission*, 265 N.C. 209, 211, 212, 143 S.E. 2d 244 (1965), we find:

The rule governing the competency and admissibility of evidence of purchase price paid by a condemnee for land later appropriated for public use, in a proceeding to recover damages for the taking, is stated in *Highway Commission v. Coggins*, 262 N.C. 25, 29, 136 S.E. 2d 265, thus:

“It is accepted law that when land is taken in the exercise of eminent domain, it is competent as evidence of market value to show the price at which it was bought if the sale was voluntary and not too remote in point of time.’ *Palmer v. Highway Commission*, 195 N.C. 1, 141 S.E. 338. When land is taken by condemnation evidence of its value within a reasonable time before the taking is competent on the question of its value at the time of the taking. But such evidence must relate to its value sufficiently near the time of taking as to have a reasonable tendency to show its value at the time of its taking. The reasonableness of the time is dependent upon the nature of the property, its location, and the surrounding circumstances, the criterion being whether the evidence fairly points to the value of the property at the time in question. *Highway Commission v. Hartley*, 218 N.C. 438, 11 S.E. 2d 314.”

In determining whether such evidence is admissible, the inquiry is whether, under all the circumstances, the purchase price fairly points to the value of the property at the time of the taking. Some of the circumstances to be considered are the changes, if any, which have occurred between the time of purchase by condemnee and the time of taking by condemnor, including physical changes in the property taken, changes in its availability for valuable uses, and changes in the vicinity of the property which might have affected its value. The fact that some changes have taken place does not *per se* render the evidence incompetent. But if the changes have been so extensive that the purchase price does not reasonably point to, or furnish a fair criterion for determining, value at the time of the taking, when purchase price is considered with other evidence affecting value, the evidence of purchase price should be excluded. *Highway*

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Commission v. Coggins, supra; Redevelopment Commission v. Hinkle, 260 N.C. 423, 132 S.E. 2d 761; *Highway Commission v. Hartley, supra*; 18 Am. Jur., Eminent Domain, § 351, pp. 994-5.

The undisputed evidence, including maps, tended to show: the 112-acre tract of land involved in this cause is located in rural Guilford County, not far from the City of Greensboro. Approximately 79 acres of the land lie on the south side of Hicone Road and the remaining 33 acres lie on the north side of that road. The portion north of Hicone Road consists of two parcels, the parcel bordering Hicone Road containing 17.9 acres and the parcel immediately north of it containing 15.12 acres. County Road 2790, which runs northwardly from Hicone Road, is the eastern boundary of the 17.9-acre parcel; said road is also the eastern boundary of the 15.12-acre parcel except for a small strip that extends to the east of the road. The strip of land over which petitioner seeks a right-of-way is 150 feet wide and contains 9.22 acres; it completely crosses the western portion of respondents' land located south of Hicone Road and crosses the southwestern corner of their land located north of Hicone Road.

On cross-examination of respondent Dan R. Busick, petitioner attempted to show that the Busicks purchased their 15.12-acre parcel in August of 1971 for \$17,500. The stipulated date of taking was 1 November 1972. In the absence of the jury, the trial judge conducted a hearing to determine if there had been a significant change in the value of land in the area between August of 1971 and 1 November 1972. Following the hearing, the trial judge found that there had been significant changes in that: (1) after August of 1971, the 15.12-acre parcel, together with a portion of the remainder of the 112-acre tract, were rezoned from A-1 to R-20S, resulting in all of the 112 acres being R-20S; (2) between August of 1971 and 1 November 1972, a construction company acquired ten building lots on the east side of County Road 2790 north of Hicone Road and began construction of approximately seven dwellings; and (3) between said dates, and in the vicinity of the 112-acre tract, "various homes were being constructed along the roads located in that area."

We note that a substantial portion of the 112-acre tract exclusive of the 15.12-acre parcel was rezoned from A-1 to R-20S prior to August of 1971. We also note that the substantial difference between A-1 and R-20S classifications is that in A-1 areas,

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one dwelling per acre is allowed and in R-20S areas, one dwelling per 20,000 square feet (slightly less than one-half acre) is allowed. Considering all the facts appearing, we hold that the findings of the trial judge did not justify disallowance of evidence showing what respondents Busick paid for the 15.12-acre parcel not more than fifteen months before the date of taking. Assignments of error three and four are sustained.

[3] By its assignment of error six, petitioner contends the trial judge expressed an opinion on the facts in evidence in violation of G.S. 1A-1, Rule 51(a). We think this assignment has merit.

Respondents presented Fred R. Patterson as a witness to show the value of the 112-acre tract before and after the taking. In the early part of his testimony, Mr. Patterson testified that while he was not familiar with the specific property on or before 1 November 1972, he was "familiar with the area in general"; that he went on the property first in January of 1973. Thereafter, the record discloses the following:

COURT: Mr. Patterson, you said you didn't go there until 1973. But did you take into consideration that your responsibility was to arrive at a fair market value of this land, not as of the date you went there, but as of the date of November 1, 1972?

WITNESS: I did.

COURT: You allowed for changes after November 1, 1972?

WITNESS: I did.

COURT: And arrived at the value that you placed on it in 1973 for its value as of November 1, 1972?

WITNESS: Yes, sir.

COURT: Rephrase your question.

Shortly thereafter, on voir dire in the absence of the jury, Mr. Patterson stated that it was January of 1974 rather than January of 1973 that he first went on the subject property.

We think the colloquy between the trial judge and the witness set out above is analogous to that held to be reversible error in *In re Will of Bartlett*, 235 N.C. 489, 493, 70 S.E. 2d 482, 488 (1952). We quote from the opinion by Justice Ervin (page 493): "A trial judge has undoubted power to interrogate

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a witness for the pupose of clarifying matters material to the issues. *S. v. Horne*, 171 N.C. 787, 88 S.E. 433; *Eekhout v. Cole*, 135 N.C. 583, 47 S.E. 655. He should exercise such power with caution, however, lest his questions, or his manner of asking them, reveal to the jury his opinion on the facts in evidence and thus throw the weight of his high office to the one side or the other. . . . ”

The qualifications of Mr. Patterson to testify as to the value of the land in question immediately before and immediately after the taking were, at best, minimal. We think his opinion that respondents' land was damaged approximately \$78,643 was strengthened by his colloquy with the trial judge to the prejudice of petitioner. The assignment of error is sustained.

We hold that the assignments of error which we have sustained were sufficiently prejudicial to petitioner to warrant a new trial. We refrain from discussing the other assignments of error argued in petitioner's brief as the questions presented by them probably will not arise at a retrial of the cause.

New trial.

Judges HEDRICK and BALEY concur.

INDUSTRIAL AIR, INC. OF GREENSBORO v. GEORGE BRYANT,
DOING BUSINESS AS CONVERTERS YARN COMPANY AND CON-
VERTER'S YARN SALES, INC.

No. 7418SC656

(Filed 16 October 1974)

Contracts § 24; Corporations § 25— corporate president's signature on contract — no individual liability

In an action to recover for breach of a contract for installation of air conditioning in the plant of the corporate defendant, evidence that the president of the corporate defendant signed his name between the written corporate signature and his signature as president on the contract and that the word "Owner" was printed on the form below his name was not sufficient to support a finding that the president executed the contract as an individual, and the president was not individually liable on the contract where all the evidence concerning the negotiations and execution of the contract supports the conclusion that plaintiff did not deal with the president as an individual but as the executive officer of the corporate defendant.

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APPEAL by defendant, George Bryant, from *Kivett, Judge*, 4 February 1974 Session of Superior Court held in GUILFORD County.

Heard in Court of Appeals 28 August 1974.

This is an action to recover damages for breach of contract. It is brought by plaintiff, a corporation engaged in the business of installing air conditioning systems, against Converter's Yarn Sales, Inc., a corporation, and George Bryant, individually, doing business as Converters Yarn Company.

The complaint alleges two causes of action which involved proposals made by plaintiff on 1 May 1971 and on 3 August 1971 for installing air conditioning systems in the manufacturing plant of defendants located at Efland, North Carolina. Plaintiff asserts that the defendants accepted both proposals but later breached the contracts causing damages of \$6,000.00 under the 1 May 1971 cause of action and \$5,310.00 under the 3 August 1971 cause of action.

Defendant corporation, Converter's Yarn Sales, Inc. (Converter's), and the individual defendant, George Bryant (Bryant), doing business as Converters Yarn Company, filed separate answers in which they denied the existence of any contracts and denied that plaintiff had sustained any damages. Converter's also set up a counterclaim for \$11,460.00 arising out of the alleged improper installation of doffing equipment.

Plaintiff in its reply denied the counterclaim of Converter's and sought recovery of \$7,600.25 as the purchase price for the doffing equipment.

The case was heard by the trial court without a jury.

The court made findings of fact from which it concluded that the corporate defendant, Converter's, had breached contracts which it had executed with the plaintiff arising out of the 1 May 1971 and 3 August 1971 proposals and that the individual defendant, Bryant, had breached the contract which he had executed arising out of the 3 August 1971 proposal. The trial court awarded damages in the amount of \$3,504.00 from Converter's on the first cause of action and \$5,310.00 from Converter's and Bryant, jointly and severally, on the second cause of action.

Converter's did not appeal.

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The defendant Bryant appealed from that portion of the judgment holding him individually liable on the August contract.

Other facts which may be pertinent to a decision will be discussed in the opinion.

Jordan, Wright, Nichols, Caffrey & Hill, by G. Marlin Evans, for plaintiff appellee.

Bryant, Lipton, Bryant & Battle, by James B. Maxwell and Lee A. Patterson II, for defendant appellant.

BALEY, Judge.

This appeal brings into question only those matters decided by the trial court which relate to the individual defendant, George Bryant. If it is determined that there is no competent evidence that Bryant signed the August proposal of plaintiff as an individual, he would not be bound thereby. We are of the opinion that the exceptions of the defendant, Bryant, to the findings of fact and conclusions of law holding him to be individually liable under the August proposal are well taken, and the judgment entered against him must be reversed.

In its judgment the trial court recited the following pertinent findings of fact and conclusions of law:

"FINDINGS OF FACT

. . . .

5. On or about August 3, 1971, the plaintiff submitted another proposal dated August 3, 1971, for the installation of a smaller air conditioning system in the new plant addition at Efland, North Carolina. On August 23, 1971, George Bryant executed the acceptance of the proposal by signing his name 'George A. Bryant,' as owner as well as by signing his name 'George Bryant' as president of Converter's Yarn Sales, Inc."

"CONCLUSIONS OF LAW

. . . .

3. Both the defendant George A. Bryant, individually, and Converter's Yarn Sales, Inc., entered into a contract with the plaintiff for the installation of an air conditioning system for the sum of \$23,539.00, and both defendants breached said contract.

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4. The plaintiff has been damaged in the amount of \$5,310.00 as a result of the breach of said contract, and the defendants George A. Bryant and Converter's Yarn Sales, Inc., are liable, jointly and severally, to the plaintiff in said amount."

Where a jury trial is waived, the findings of fact of a trial court are conclusive if supported by any competent evidence. If such findings of fact support a proper basis for the judgment, it will not be disturbed on appeal. *Cogdill v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373; *Huski-Bilt, Inc. v. Trust Co.*, 271 N.C. 662, 157 S.E. 2d 352.

The evidence in this case disclosed a series of negotiations concerning the installation of an air conditioning system in the plant of the corporate defendant. These negotiations were conducted on behalf of Converter's by its president, George Bryant. The proposals from plaintiff in May and August were made in writing to Bryant at the company address at Efland. The instructions to terminate any contracts which were entered were issued by Bryant as president of the corporation and on its stationery and were honored by plaintiff. The cancellation notice concerning the August proposal on which Bryant was held personally liable was on corporate stationery, signed by George A. Bryant, president, and specifically set out in the body of the letter "We are requesting that you hold up on any further progress concerning the air conditioning project for Converter's Yarn Sales, Inc." At no point in the evidence is there any indication that plaintiff was relying upon Bryant individually, but it was always dealing with him as the executive officer of the corporation. The August proposal which was an exhibit at the trial showed the following signature:

Converter Yarn Sales
George A. Bryant
(Owner)
By: George A. Bryant Title President ✓
Date: 8/23/51

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The addendum to this proposal providing for an additional fume removal system and executed the same date was also on exhibit and showed:

George A. Bryant, Inc. S.C.
(Owner)
By: George A. Bryant Title President
Date: 5/5 3/51

The intent of the parties as revealed in the transaction as a whole, and not the signatures alone, determines liability. *Whitney v. Wyman*, 101 U.S. 392; *Fowle v. Kerchner*, 87 N.C. 49. The mere fact that Bryant signed "George A. Bryant" between the written corporate signature and his signature as president on the proposal of plaintiff and that the word "Owner" was printed on the form below his name is not sufficient evidence from which to find as a fact that he executed the contract as an individual. All the evidence concerning the negotiations and execution of the contracts supports the conclusion that plaintiff did not deal with Bryant as an individual but as the executive officer of Converter's.

The finding of fact that George Bryant executed the acceptance of the proposal by signing his name as owner is not supported by competent evidence. It would follow that the conclusion of law that Bryant, individually, had entered any contract with plaintiff is in error, and that portion of the judgment which awards recovery against Bryant is hereby vacated.

Reversed.

Judges BRITT and HEDRICK concur.

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STATE OF NORTH CAROLINA v. WILLIAM HOWARD McDONALD

No. 7415SC610

(Filed 16 October 1974)

1. Automobiles § 3— driving while license suspended — officer's knowledge that license was suspended

In a prosecution for driving while license was suspended, the trial court did not err in permitting the arresting patrolman to testify that he knew defendant's license had been suspended based upon a list of suspended licenses received by his patrol unit from the Department of Motor Vehicles where the testimony was offered to show the patrolman's reason for stopping defendant and not as substantive proof of the license suspension, compliance with the statutes governing authentication and admissibility of driving records being unnecessary in such case. G.S. 8-35; G.S. 20-42(b).

2. Criminal Law § 99— explaining solicitor's question — no expression of opinion

In a prosecution for driving while license was suspended, the trial court did not express an opinion about defendant's inability to produce a driver's license in explaining the thrust of a question by the solicitor incident to ruling on an objection thereto.

3. Automobiles § 3— identity of driving record

In a prosecution for driving while license was suspended, it is immaterial that the trial judge failed to recite the identity of a driving record introduced in evidence where an officer had previously identified the record as that of defendant.

4. Criminal Law § 114— expression of opinion — use of "it therefore appears"

In a prosecution for driving while license was suspended, the trial court did not express an opinion in use of the words "it therefore appears" in summarizing defendant's driving record which had been introduced in evidence.

5. Automobiles § 3—notice of suspension of license — production by machine — absence of official's signature

Fact that a notice and record of suspension of license mailed to defendant was produced by a machine and that it was not signed by an official of the Department of Motor Vehicles did not render it inadmissible in evidence. G.S. 20-48.

6. Automobiles § 3— driving while license suspended — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution of defendant for driving while his license was suspended.

7. Criminal Law § 112— reasonable doubt — presumption of innocence — instructions

Absent request, the trial court is not required to define reasonable doubt, and when he charges correctly on reasonable doubt, he is not

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required to charge on the presumption of innocence unless requested to do so.

8. Criminal Law § 116— charge on defendant's failure to testify

Trial court's charge concerning defendant's failure to testify was sufficient where the court charged that defendant could elect to take the stand or to remain silent and that his silence was not to be considered against him.

9. Automobiles § 3— driver's license — notice of change of address

In a prosecution for driving while license was suspended, defendant was not prejudiced by the court's erroneous instruction that a person who drives is required by G.S. 20-48 to give notice of a change of address to the Department of Motor Vehicles.

APPEAL by defendant from *Clark, Judge*, 21 January 1974 Session of Superior Court, ALAMANCE County. Heard in the Court of Appeals 17 September 1974.

Defendant was arrested and charged with operating a motor vehicle on a public street or highway while his operator's license was suspended, in violation of G.S. 20-28(a). The jury found the defendant guilty as charged. From judgment imposing a sentence of not less than four months nor more than six months with a recommendation for work release, defendant appealed.

The State's evidence tended to show that on 26 June 1973 defendant was operating a 1973 Ford near the intersection of Davis and Spring Streets in Burlington when Officer James Lynch stopped him and arrested him for operation of a motor vehicle with a suspended license in violation of G.S. 20-28(a); that defendant was not operating the car in any unusual manner prior to his arrest, but that Officer Lynch knew defendant personally and knew that defendant's license had been suspended based upon a list of suspended licenses received by his patrol unit from the Department of Motor Vehicles.

Additional facts necessary for decision are set forth in the opinion.

Attorney General Carson, by Associate Attorney Kirby, for the State.

John D. Xanthos for defendant appellant.

MORRIS, Judge.

[1] Defendant first argues that the trial court erred in allowing Officer Lynch to testify as to the status of defendant's

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driver's license from a source other than the records of the North Carolina Department of Motor Vehicles. It is defendant's contention that the court should have required compliance with the provisions of G.S. 8-35 and G.S. 20-42(b) since those statutes govern proper authentication and admissibility of driving records. We disagree. This testimony was not offered as substantive proof of the license suspension. It was offered primarily to show the officer's reason for stopping defendant. Other evidence clearly established the status of defendant's driver's license so that defendant was not prejudiced by this testimony in any way.

[2] Defendant next asserts that the trial court violated G.S. 1-180 by expressing an opinion about defendant's inability to produce a North Carolina driver's license. Defendant's argument is not persuasive. The record shows that the statement of the trial judge was obviously only a paraphrase of a question asked by the solicitor. The judge was not making an independent observation of his own, but simply was explaining the thrust of the solicitor's question incident to the overruling of defendant's objection. Even if the comment was improper, which we do not concede, defendant has not shown he was prejudiced thereby.

Defendant maintains the trial court erred in allowing State's Exhibits 1 and 2 to be introduced into evidence, in reading therefrom, and in stating to the jury what "appears from this record" since (1) Exhibit 1 did not identify the defendant, (2) the court made an improper comment with respect to Exhibit 1, and (3) Exhibit 2 lacked a proper certificate of mailing and a signature.

[3] More specifically, defendant contends there is nothing in the record on appeal showing that the driving record introduced at trial was the driving record of the defendant. Defendant's contention is without merit. It is immaterial that the trial judge did not recite the identity of the driving record among those parts introduced into evidence since Officer Lynch had previously fully identified the record as that of the defendant. Furthermore, we note that the identity of the driving record was never denied by the defendant at the trial.

[4] With respect to the allegedly improper comment by the trial judge concerning Exhibit 1 defendant argues that the words, "it therefore appears" used by the court in summing

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up the record constituted a violation of G.S. 1-180. We do not agree. It repeatedly has been held that it is not improper for a trial judge to state that certain evidence "tends to show" a certain fact. E.g., *State v. Huggins*, 269 N.C. 752, 153 S.E. 2d 475 (1967); *Womble v. Morton*, 2 N.C. App. 84, 162 S.E. 2d 657 (1968). The phraseology used by the court here is of the same import.

[5] The defendant also asserts that Exhibit 2, the official notice and record of suspension of driving privileges which was mailed to the defendant, should not have been allowed into evidence since "it was produced from a data-type machine, in robot fashion, and never signed by any official" and since the record does not show the required certificate of mailing. We find no merit in defendant's contentions. The fact the notice and record of suspension was produced by a machine is irrelevant, its only purpose being to give the defendant notice of the suspension. Furthermore, we find nothing in G.S. 20-48, the statute providing for the manner in which notice is to be given, requiring an official of the Department of Motor Vehicles to sign the notice.

With respect to the certification of Exhibit 2, while the certificate was not shown when this exhibit was reproduced in the record, we note that copies of the exhibit filed with the court demonstrate that the actual exhibit did contain on its face the certification required by G.S. 20-48. The certification was the standard one used by the Department of Motor Vehicles and was stamped on the notice and signed by V. Ferrell, an employee of that department. Concerning the legibility of the certificate defendant argues that the "blurred, illegible, rubber-stamped conglomeration in the lower left-hand corner of State's Exhibit 2" is not sufficient to constitute a proper certification as to the mailing. After viewing the exhibit carefully, we conclude the certification was sufficiently legible to constitute a valid certification under the statute.

[6] Defendant also maintains that the trial court erred in not granting his motions for a nonsuit at the close of the State's evidence and at the close of all of the evidence. Such a motion "is properly denied if there is any competent evidence to support the allegations of the warrant . . ., considering the evidence in the light most favorable to the State." *State v. McCuien*, 15 N.C. App. 296, 190 S.E. 2d 386, cert. denied 282 N.C. 154 (1972). Having concluded that both of the State's exhibits

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were competent and that the testimony of Officer Lynch with regard to information he obtained from police headquarters was admissible, it follows that there was sufficient evidence to withstand defendant's motions.

[7] In his fifth assignment of error defendant contends that the trial court erred in failing to give proper instructions to the jury on the presumption of innocence. Defendant argues that nowhere in the charge is "reasonable doubt" defined and, therefore, it was incumbent on the trial court to charge on the presumption of innocence even without request. We do not agree. Absent request, the trial court is not required to define reasonable doubt, and when he charges correctly on reasonable doubt, he is not required to charge on the presumption of innocence unless requested to do so. *State v. Flippin*, 280 N.C. 682, 186 S.E. 2d 917 (1972). Here, the trial court had charged on reasonable doubt, albeit minimally, and there was no request for an instruction on presumption of innocence. This assignment of error is overruled.

[8] Defendant insists the trial court's charge concerning defendant's failure to testify was grossly inadequate. The court stated:

"The defendant may take the stand or he may remain silent, he may elect either one. If he does elect to remain silent, under the law you will not consider this against him or to his prejudice in the trial."

The judge instructed the jury not only that the defendant had a right to remain silent, but also that his silence was not to be considered against him. Manifestly, the jury must have clearly understood that defendant had a legal right to elect to testify or not to testify in his own behalf. We find no error.

[9] Defendant contends the court's instructions on G.S. 20-48 were inadequate and incorrect. In this case, the defendant's license was suspended pursuant to G.S. 20-16 which requires that incident to the suspension, notice be sent to the driver affected. The manner of giving such notice is covered by G.S. 20-48, a general provision, applicable to all instances in which notice is required under Chapter 20 of the General Statutes. We concede the trial court erred in charging that "the provisions of the statute" places a duty on the person who drives to give notice of a change of address. As was pointed out by this Court in *State v. Teasley*, 9 N.C. App. 477, 485, 176 S.E. 2d 838

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(1970), there exists no statute in this State requiring a person holding an operator's or chauffeur's license to notify the Department of Motor Vehicles when he changes his address, though it might be the better practice to do so. It is well settled in this State, however, that instructions to the jury, even though technically erroneous, will not warrant a new trial when such instruction could not have adversely affected the verdict. *Highway Commission v. Nuckles*, 271 N.C. 1, 155 S.E. 2d 772 (1967). We conclude the verdict in this case was not affected by the error in the charge and that defendant was not prejudiced in any way.

The remaining assignments of error are also directed to the court's instructions to the jury. The charge fairly applied the law to the facts and was free from prejudicial error.

No error.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. ROBERT BROWN AND BETTY RIDDLE AND STATE OF NORTH CAROLINA v. GEORGE RICO RAY

No. 7413SC760

(Filed 16 October 1974)

1. Larceny § 6— currency seized from defendant's vehicle — admissibility

The trial court in this larceny case did not err in allowing into evidence currency allegedly found in the trunk of defendant Ray's automobile where approximately \$500 was taken from a store safe, most of it consisting of one-dollar bills, prior to the date of the crime the store manager had made a list of serial numbers from bills that were in the safe, the money taken from defendant's trunk totaled \$498, most of it in one-dollar bills, and the serial numbers on five of the bills matched the serial numbers on the list made by the store manager.

2. Larceny § 7— larceny of money — sufficiency of evidence

Evidence in a larceny case was sufficient to be submitted to the jury where it tended to show that two defendants obstructed the view into a store office while the third defendant took cash from the safe and that two defendants left the store together and drove around the area in order to pick up the third defendant who had left the store alone and jumped over the railing at the back of the store parking lot.

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3. Criminal Law § 113— doctrine of flight — instructions proper

The trial court's instructions as to the doctrine of flight pertained to one defendant only and the other two defendants were not prejudiced thereby.

ON *certiorari* to review the defendants' trial before *Clark, Judge*, 13 February 1973 Session of Superior Court held in BLADEN County. Heard in the Court of Appeals on 18 September 1974.

This is a criminal prosecution wherein the defendants, Robert Brown, Betty Riddle, and George Rico Ray, were charged in separate bills of indictment, proper in form, with the larceny of \$498.00 from the Winn Dixie Store, a corporation, in Elizabethtown, N. C.

The three cases were consolidated for trial and the State introduced evidence tending to show the following:

At approximately 5:30 p.m. on 25 February 1972, defendants Robert Brown and Betty Riddle were observed in the Winn Dixie Store in Elizabethtown by at least two of the store's employees. They were seen standing at a public telephone which was located near the door to the store's office and were standing in such a way that it was difficult to see through the door into the office. George Bryant, one of the store employees, testified that Robert Brown was holding the telephone receiver and that Betty Riddle was standing right behind him. He did not see Brown speak into the phone. Another employee, Michael Sasser, testified that he saw Betty Riddle holding the receiver and that Brown was standing right behind her. It was estimated that these two defendants stood in front of the door to the office for ten minutes. Sasser testified that he observed a black male wearing a blue nylon windbreaker crouching at the safe inside the store office. When he returned from reporting to his supervisor that someone was in the office, Brown, Riddle, and the man in the windbreaker were gone. Almost immediately thereafter, Sasser observed some money on the floor at the front door to the store. He told Bryant, who was returning to the store from taking a customer's groceries to her car, that the store had been robbed and pointed to the parking lot. Bryant observed defendant Brown cross the railing at the north end of the parking lot and, as Brown "was jogging along," Bryant followed him. Bryant followed defendant Brown east on King Street and continued to follow him until Brown was stopped

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by Officers Priest and Little of the Elizabethtown Police Department about a block to the east and to the rear of the Winn Dixie Store at the intersection of Lower and Swanzy Streets.

Prior to apprehending defendant Brown, the officers had observed a Lincoln Continental in the vicinity of the Winn Dixie Store. When they first observed it, it was parked in the loading area behind the Winn Dixie Store. As they approached, it pulled off and made a right turn onto Swanzy Street. It turned onto Highway 701 and then made a right turn taking it back toward the Winn Dixie parking lot. After the officers had taken Brown to the Bladen County jail, Officer Little went back to the Winn Dixie Store. As he neared the store, he observed the same Lincoln Continental parked in front of and to the right of the Winn Dixie Store. The automobile then backed onto King Street, proceeded east, and turned right into an alleyway that runs along the north side of the Winn Dixie. The automobile then turned into the parking lot at the Winn Dixie Store and parked. Officer Little testified that he approached the car and observed defendant Betty Riddle in the back seat of the car and defendant Ray in the driver's seat.

After informing Ray of his constitutional rights, Ray consented to a search of the car. At first Ray stated that he had left the trunk key at his home in Charlotte and then stated that he had locked the key inside the trunk along with \$400.00 of his own money. With Ray participating in the search, the key to the trunk, a blue windbreaker, and \$498.00 in currency was found in the trunk of the car. This money consisted of 478 one-dollar bills, two five-dollar bills, and a ten-dollar bill. A pair of rubber gloves and an afro-type wig were found under the front seat of the car. Officer Little testified that before reaching the car, defendant Riddle had an afro-type hairdo but that when she got out of the car her hair was pinned close to her head. The store employees testified that Riddle had an afro-type hairdo when she was inside the Winn Dixie.

The manager of the Winn Dixie Store, B. C. Smith, testified that approximately \$500.00 had been taken from the safe. He stated that with the exception of a couple of tens and fives the missing money consisted of one-dollar bills. He further testified that the serial numbers on five of the bills found in the trunk of Ray's car (totaling \$22.00—one ten-dollar bill, two five-dollar bills, and two one-dollar bills) matched a list of

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serial numbers taken from bills in the store's safe by Smith a couple of months prior to 25 February 1972.

Defendants Robert Brown and Betty Riddle did not testify or offer any evidence.

Defendant George Rico Ray testified in his own behalf and denied that he participated in the larceny of the \$498.00.

Each defendant was found guilty as charged and from judgments entered on the verdict, the defendants appealed. The defendants' application to this court for writ of certiorari to perfect a late appeal was granted on 23 May 1974.

Attorney General James H. Carson, Jr., by Assistant Attorney General Edwin M. Spears, Jr., and Associate Attorney Ralf F. Haskell for the State.

Chandler & Hill, P.A. by J. B. Chandler, Jr., for defendant appellants.

HEDRICK, Judge.

Assignments of error 2, 5, 6, 13, 26, 27, and 30 are common to the appeals of the three defendants and primarily present the questions of whether the court erred in admitting into evidence the \$498.00 in currency (State's Exhibits 2 through 8) allegedly found in the trunk of defendant Ray's automobile and whether the evidence was sufficient to require the submission of the cases to the jury and to support the verdicts. Defendants assert that the currency was not properly identified by the owner thereof and that it was error for the court to allow it to be introduced into evidence. The defendants further contend that the evidence was not sufficient to withstand their motions for judgment as of nonsuit and to support the verdicts. We do not agree.

[1] B. C. Smith, the manager of the store, testified that approximately \$500.00 belonging to the store was missing from the safe. Most of the money consisted of one-dollar bills. Sometime prior to the date of the crime, Mr. Smith had made a list of serial numbers from bills that were in the safe at the Winn Dixie Store. Officer Little found \$498.00 in the trunk of defendant Ray's automobile. This money consisted of 478 one-dollar bills, two five-dollar bills and a ten-dollar bill. The serial numbers on two of the one-dollar bills, the two five-dollar bills, and the ten-dollar bill matched the serial numbers on the list made

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by Mr. Smith from the bills that were missing from the store safe. All of the exhibits challenged by these exceptions were properly identified and admitted into evidence.

[2] The evidence, when viewed in the light most favorable to the State, is sufficient to raise an inference that the defendants were acting in concert. Defendants Riddle and Brown stationed themselves in such a manner, while pretending to use the telephone, that they obstructed the view into the office while the defendant Ray took the cash from the safe. The defendants Ray and Riddle left the store together and drove around the area in Ray's automobile in order to pick up defendant Brown who had left the store alone and jumped over the railing at the back of the parking lot. See *State v. Rankin*, 284 N.C. 219, 200 S.E. 2d 182 (1973) and *State v. Washington*, 17 N.C. App. 569, 195 S.E. 2d 1 (1973). These assignments of error are not sustained.

[3] Defendants George Rico Ray and Betty Riddle also contend that the trial court committed prejudicial error as to them by instructing the jury that it could consider the doctrine of flight along with the evidence presented in determining their possible guilt. The defendants' Ray and Riddle have apparently seized upon the court's statement that flight could indicate guilt of "any defendant" as a basis for this assignment of error. A review of the entire charge indicates that the instruction regarding flight pertained only to defendant Brown. It is well settled that the court has wide discretion in presenting the issues to the jury so long as it states the evidence plainly and fairly without expressing an opinion. *State v. Biggs*, 224 N.C. 722, 32 S.E. 2d 352 (1944). It is also well settled that on appeal the court's instructions will be viewed in their entirety. *Hammond v. Bullard*, 267 N.C. 570, 148 S.E. 2d 523 (1966). These assignments of error have no merit.

Each of the defendants have additional assignments of error which we have carefully considered and find to be without merit.

The defendants had a free trial free from prejudicial error.

No error.

Judges BRITT and BAILEY concur.

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SHERRY PAMELA SINK v. KENNETH WESLEY EASTER, JR.

No. 7422SC703

(Filed 16 October 1974)

Appeal and Error § 16; Rules of Civil Procedure § 60— rescission of judgment while appeal pending

The court had no jurisdiction to rescind its judgment denying plaintiff's motion under Rule 60 to set aside its dismissal of the action for lack of jurisdiction while an appeal from the judgment was pending.

Judge BALEY dissenting.

APPEAL by defendant from *Wood, Judge*, 13 May 1974 Civil Session of Superior Court held in DAVIDSON County.

This action was instituted on 4 September 1971 to recover for bodily injuries allegedly sustained by plaintiff as a result of the negligent operation of an automobile by defendant on 6 September 1968. On 10 September 1971, the sheriff returned the summons with the following notation: "Kenneth Wesley Easter—not to be found in Guilford County—in Amsterdam—Address unknown."

The complaint was filed on 23 September 1971. On 1, 8, and 15 October 1971, a notice of service of process by publication was published in a newspaper. On 11 November 1971, defendant filed a motion to dismiss upon the ground that the court lacked jurisdiction over the person of defendant due to insufficiency of service of process. This motion was denied in an order dated 27 December 1971 and filed 27 March 1972. Defendant excepted to the denial of his motion and gave notice of appeal, preserving his exception for determination upon any subsequent appeal. On 25 April 1972, defendant filed answer.

On 7 February 1974, defendant, pursuant to Rule 60(b)(6), filed a "Motion to Dismiss," following the Supreme Court opinion filed 25 January 1974 in the companion case of *James A. Sink v. Kenneth Wesley Easter, Jr.*, 19 N.C. App. 151, 198 S.E. 2d 43 (1973), *rev'd* 284 N.C. 555, 202 S.E. 2d 138, *rehearing denied* 285 N.C. 597 (1974).

In this motion, defendant set forth that the Supreme Court had held in the companion case that the service of process was fatally defective and that defendant was entitled to have that

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case dismissed; that the facts regarding service of process in this case are identical to those in the companion case, therefore, defendant is entitled to a dismissal of this case. The record then reveals the following pertinent proceedings:

1. On 21 March 1974, a judgment signed by Judge Wood, bearing date of 18 February 1974, was filed. This judgment recited that defendant's motion to dismiss the action should be allowed, and ordered that the action be dismissed "for lack of jurisdiction."

2. On 18 March 1974, plaintiff filed numerous affidavits.

3. On 28 March 1974, plaintiff, pursuant to Rule 60 and on grounds of mistake, inadvertence, etc., moved for relief from the judgment filed 21 March 1974 granting defendant's motion to dismiss.

4. On 27 March 1974, Judge Wood entered judgment (filed 28 March 1974) (1) correcting the rendition date of the judgment filed 21 March 1974 from 18 February 1974 to 18 March 1974, and (2) reciting that in rendering the judgment filed on 21 March 1974 the court did not consider the affidavits filed by plaintiff on 18 March 1974.

5. On 28 March 1974, plaintiff filed notice of appeal and appeal entries to the judgment filed 21 March 1974 as amended by the judgment filed 28 March 1974.

6. Also, on 28 March 1974, a judgment of Judge Wood, dated same day, denying plaintiff's motion for relief under Rule 60 from the judgment entered 21 March 1974 was filed. Plaintiff gave notice of appeal to this judgment on 28 March 1974 and appeal entries were filed on the same day.

7. On Page 42 of the record appears "ORDER AND OFFICIAL PROCEEDINGS (filed April 1, 1974)." Thereunder is set forth directions by the court (Judge Wood) that the judgment entered on 28 March 1974 denying plaintiff's motion under Rule 60 for relief from the judgment dated 18 March 1974 and "entered" 21 March 1974 be set aside. The court then announced that it was proceeding to conduct a hearing on plaintiff's motion for relief under Rule 60. Defendant excepted. Plaintiff proceeded to introduce the affidavits filed on 18 March 1974 after which the court stated it would rule on the motion later.

8. On 17 May 1974, plaintiff filed a "Withdrawal of Appeal" dated 9 May 1974 setting out that she was withdrawing

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and abandoning the appeal previously taken by her "from the judgment dismissing this action for lack of jurisdiction." On 15 May 1974, Judge Wood signed an order declaring the appeal withdrawn and abandoned.

9. On 16 May 1974, Judge Wood entered an order (filed 17 May 1974) in which, after finding facts and making conclusions of law, he allowed plaintiff's motion for relief under Rule 60, set aside the judgment dismissing the action, and denied defendant's motion to dismiss the action for lack of jurisdiction.

Defendant appealed.

McLendon, Brim, Brooks, Pierce & Daniels, by Hubert B. Humphrey, Jr., and Lambeth & McMillan, by Charles F. Lambeth, Jr., for plaintiff appellee.

Charles H. McGirt, by G. Thompson Miller, and Walser, Brinkley, Walser & McGirt, by G. Thompson Miller, for defendant appellant.

BRITT, Judge.

Defendant advances numerous contentions as to why the order of 16 May 1974 is invalid. One of these is that the court had no jurisdiction on 1 April 1974 to rescind its judgment entered 28 March 1974 denying plaintiff's motion for relief under Rule 60. We find merit in this contention.

When the court entered its judgment on 28 March 1974 denying plaintiff's Rule 60 motion for relief, plaintiff, on the same day, gave notice of appeal and appeal entries were entered. The general rule as to jurisdiction of the trial court after notice of appeal has been given and appeal entries filed has been explicitly stated by our Supreme Court. In *Wiggins v. Bunch*, 280 N.C. 106, 108, 184 S.E. 2d 879, 880 (1971), we find:

For many years it has been recognized that as a general rule an appeal takes the case out of the jurisdiction of the trial Court. In *Machine Co. v. Dixon*, 260 N.C. 732, 133 S.E. 2d 659, it was stated:

"As a general rule, an appeal takes a case out of the jurisdiction of the trial court. Thereafter, pending the appeal, the judge is *functus officio*. ' . . . (A) motion in the cause can only be entertained by the court where the cause is.' Exceptions to the general rule are: (1) notwith-

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standing notice of appeal a cause remains *in fieri* during the term in which the judgment was rendered, (2) the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned, (3) the settlement of the case on appeal. . . .”

Accord: *Pelaez v. Carland*, 268 N.C. 192, 150 S.E. 2d 201; *Hoke v. Greyhound Corp.*, 227 N.C. 374, 42 S.E. 2d 407; *Bank v. Twitty*, 13 N.C. 386; *Equipment, Inc. v. Lipscomb*, 15 N.C. App. 120, 189 S.E. 2d 498 (1972).

The question arises as to whether Judge Wood's action (there being no formal order or judgment) of 1 April 1974 comes within any of the exceptions to the general rule stated in the authorities above cited. Clearly, exceptions (2) and (3) would not be applicable. As to (1), this court takes judicial notice of the fact that on 1 April 1974 Judge Wood began presiding over a regular two-week session of Superior Court in Davidson County; therefore, his action in purporting to set aside his judgment of 28 March 1974, to which judgment notice of appeal had been filed and appeal entries made, was void since the cause was not *in fieri* during the session of superior court beginning on 1 April 1974.

The plaintiff's motion to abandon and withdraw her appeal on 9 May 1974 was from the notice of appeal given in the judgment filed 21 March 1974 and amended 28 March 1974, not from the denial of plaintiff's motion under Rule 60(b) made on the same date. The order signed by Judge Wood on 15 May 1974, allowing plaintiff to abandon and withdraw an appeal, did not encompass the denial of plaintiff's Rule 60 motion which Judge Wood on 1 April 1974 attempted to set aside but had no jurisdiction to do so. Therefore, the record does not disclose any abandonment of plaintiff's appeal from the judgment and order of 28 March 1974 denying relief under Rule 60(b).

That being true, it follows that the superior court did not have jurisdiction to enter the order dated 16 May 1974 with respect to plaintiff's Rule 60 motion since that appeal had not been abandoned.

For the reasons stated, the order dated 16 May 1974 is

Vacated.

Judge HEDRICK concurs.

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Judge BALEY dissents.

Judge BALEY dissenting.

I construe the proceedings appearing in the record as filed 1 April 1974 to constitute an adjudication by the court that the appeal of the plaintiff from denial of the Rule 60 motion had been abandoned. It follows that the Superior Court had jurisdiction to order a new hearing. After such hearing in which all parties participated, the court entered a judgment dated 16 May 1974 from which defendant has appealed.

I am of the opinion that the case should be heard and determined upon its merits. The judgment granting plaintiff's motion under Rule 60 should be affirmed.

JERRY DEAN SIDDEN v. HENRY TAYLOR TALBERT BY HIS GUARDIAN AD LITEM, LOIS S. TALBERT, AND RICHARD TAYLOR TALBERT

No. 7423DC664

(Filed 16 October 1974)

1. Automobiles § 58— turning right from left turn lane

In an action to recover for injuries received in a collision between plaintiff's motorcycle and defendants' car, the trial court properly denied defendants' motions for directed verdict where plaintiffs' evidence tended to show that defendants' vehicle was in an area marked by a traffic island indentation and designated for traffic making a left turn, and that defendant driver was giving a left turn signal immediately before he turned right and collided with plaintiff.

2. Automobiles § 90— passing statutes — instructions

The trial court properly instructed the jury on the statute prohibiting passing in an area marked by signs indicating that passing should not be attempted, G.S. 20-150(e), and the statute permitting passing when an overtaken vehicle is in a lane designated for left turns, G.S. 20-150.1(1), as those statutes bear on the issue of plaintiff's own negligence.

3. Automobiles § 90— "Do not pass" sign at intersection — instruction on purpose

The trial court properly instructed the jury that a "Do not pass" sign on the right at the approach of an intersection was to instruct vehicles not to make a passing movement to the left upon entering the intersection and did not apply to a vehicle continuing down the right lane past another vehicle which was located in the lane designated for making a left turn.

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4. Evidence § 25— photographs — illustrative purposes — failure to instruct

In the absence of a timely request, failure to instruct that a photograph was admitted for illustrative purposes only was not error.

APPEAL by defendants from *Osborne, Judge*, 11 April 1974 Session of District Court held in WILKES County.

Heard in Court of Appeals 4 September 1974.

Plaintiff instituted this action to recover for personal injuries and property damage sustained in a collision between the motorcycle he was riding and an automobile owned by defendant Richard Taylor Talbert and operated by his son Henry Taylor Talbert. The collision occurred about 12:30 a.m. on 13 May 1973 at the intersection of U. S. Highway 21 and rural paved road 1309 near Elkin, North Carolina.

The testimony of the investigating officer, Sergeant J. D. Blevins of the North Carolina Highway Patrol, showed that U. S. Highway 21 south of the intersection with rural road 1309 widens to twenty-four feet to allow two lanes of northbound traffic, one turning left and one going straight. The pavement is not marked. Similarly, north of the intersection, U. S. 21 widens to allow two lanes of southbound traffic. Both north and south of the intersection are traffic islands separating the traffic going in opposite directions. At the intersection there is an indentation in the island providing for traffic proposing to turn left. On the right shoulder approaching the intersection there is a "Do not pass" sign.

Plaintiff testified that on 13 May 1973, shortly after midnight, he was riding north on U. S. Highway 21. As he approached the intersection of U. S. 21 and rural road 1309, he saw defendant's automobile in the extreme left-hand portion of the northbound lane signalling for a left turn. Plaintiff continued straight ahead in the extreme right-hand portion of the road. Defendant suddenly without warning turned to the right into his path and collided with his motorcycle.

Defendant Henry Taylor Talbert testified that when the collision occurred he was on the right-hand side of the road, had signalled for a right turn, and was making the turn, but plaintiff attempted to pass on the right and struck his automobile.

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Motions of the defendants for a directed verdict were denied, and the case was submitted to the jury upon the usual issues of negligence, contributory negligence, and damages.

From a verdict of the jury awarding plaintiff \$5,000.00 for personal injuries and \$500.00 property damage, and judgment based thereon, defendants have appealed to this Court.

Franklin Smith for plaintiff appellee.

Finger and Park, by Daniel J. Park, for defendant appellants.

BALEY, Judge.

Defendants assign as error the failure of the trial court to grant their motions for a directed verdict.

Upon defendants' motion for directed verdict "[a]ll the evidence which tends to support plaintiff's claim must be taken as true and considered in its light most favorable to plaintiff, giving [him] the benefit of every reasonable inference which legitimately may be drawn therefrom. . . . Contradictions, conflicts and inconsistencies are resolved in plaintiff's favor. (Citations omitted.)" *Bowen v. Gardner*, 275 N.C. 363, 365-66, 168 S.E. 2d 47, 49. *Miller v. Enzor*, 17 N.C. App. 510, 195 S.E. 2d 86, cert. denied, 283 N.C. 393, 196 S.E. 2d 296.

[1] Applying this standard it seems clear that this is a case for the jury. From the evidence of plaintiff, the vehicle of defendants was in an area marked by a traffic island indentation and designated for traffic making a left turn, and defendant Henry Taylor Talbert was giving a left turn signal immediately before he turned right and collided with plaintiff. The testimony of the parties was in direct conflict on this point. Credibility of witnesses is for the jury. *Cutts v. Casey*, 278 N.C. 390, 421, 180 S.E. 2d 297, 314. The motions for directed verdict were properly overruled.

[2] Defendants also assign as error the court's instructions to the jury, specifically the portions dealing with G.S. 20-150.1 and G.S. 20-150(e) as these statutes bear on the issue of plaintiff's own negligence. G.S. 20-150(e) states: "The driver of a vehicle shall not overtake and pass another on any portion of the highway which is marked by signs or markers placed by the Board of Transportation stating or clearly indicating that passing should not be attempted." Passing on the right is per-

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mitted only under certain conditions, among them "[w]hen the vehicle overtaken is in a lane designated for left turns. . . ." G.S. 20-150.1(1).

We have carefully examined the charge of the court with respect to these statutes and the evidence in this case and find it to be proper in all respects. The evidence concerning the construction of the road with its widened approach to the intersection and the presence of traffic islands with indentations for traffic turning left at the intersection was undisputed. If the vehicle of the defendant was found by the jury to have been in the left lane at the traffic island indentation immediately prior to the collision, he would clearly have been "in a lane designated for left turns." Defendant relies upon *Teachey v. Woolard*, 16 N.C. App. 249, 191 S.E. 2d 903, which is factually distinguishable. In *Teachey* there was no evidence that the overtaken vehicles were in lanes designated for left turns.

[3] The charge of the court that the "Do not pass" sign on the right at the approach to the intersection was to instruct vehicles not to make a passing movement to the left upon entering the intersection, and did not apply to a vehicle continuing down the right lane past another vehicle which was located in the lane designated for making a left turn, was entirely proper and is approved. The purpose of the sign and the statute authorizing it is to prevent collisions with oncoming traffic or, as in this case, traffic islands. Under the interpretation urged by defendant, when a vehicle is in a lane designated for left turns and a sign says "Do not pass," no following traffic may proceed through the intersection until the lead vehicle has actually turned. We do not consider such a result to be envisioned by the legislature and are in accord with the interpretation placed upon the statute by the trial court.

[4] Defendants objected to the introduction of photographs showing injuries to the plaintiff. Concededly such photographs are not admissible as substantive evidence, 1 Stansbury, N. C. Evidence, (Brandis rev.), § 34, but they are admissible for the purpose of illustrating testimony and were so used by the plaintiff when he testified. In the absence of a timely request, failure to instruct that a photograph is admitted for illustrative purposes only is not error. *State v. Cade*, 215 N.C. 393, 2 S.E. 2d 7.

Defendants have presented thirty-two assignments of error most of which concern admissibility of evidence and the charge

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of the court. We have carefully examined all the remaining assignments and find them to be without merit.

The defendants have had a fair trial. The jury has made its decision.

No error.

Judges BRITT and HEDRICK concur.

PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY, PLAINTIFF, AND PERRY C. HENSON AND E. C. THOMPSON III, ADDITIONAL PLAINTIFFS v. GEORGE E. CLARK, DEFENDANT

No. 7418SC684

(Filed 16 October 1974)

Insurance § 135— fire loss — settlement of negligence action — subrogation claim of insurer

The evidence supported the trial court's finding that defendant accepted a settlement of \$110,000 in a negligence action for a fire loss with knowledge that it included the subrogation claim of plaintiff insurer for \$27,485 it had paid to defendant under a fire insurance policy and that defendant agreed to reimburse plaintiff insurer for his pro rata share of engineering expenses.

APPEAL by defendant from *Long, Judge*, 11 March 1974 Session of Superior Court held in GUILFORD County.

Heard in Court of Appeals 29 August 1974.

This is an action brought by plaintiff, Pennsylvania National Mutual Casualty Insurance Company (Pennsylvania), to determine the rights of the parties in the proceeds of a settlement reached in a case arising out of a fire loss sustained by defendant, George E. Clark (Clark). Pennsylvania paid Clark the sum of \$27,485.50 pursuant to a fire insurance policy which it had issued to Clark and then joined with him in a negligence action against Carolina Power and Light Company. During the trial of the negligence case a settlement was reached upon the claims of Pennsylvania and Clark for a total payment of \$110,000.00. At the time the \$110,000.00 was received, the parties were unable to agree upon the amounts to be allocated to their respective claims; hence this action.

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A jury trial was waived, and the case was heard by the court without a jury.

The principal issue in controversy was the existence of an agreement providing for the distribution of the proceeds of the settlement, and the evidence upon this point was conflicting.

The pertinent findings of fact of the trial court were as follows:

"2. Shortly after the case was settled, the attorneys for the parties hereto prepared a disbursement schedule which provided that the plaintiff was to receive \$27,485.50, less attorneys' fees and expenses and that the defendant, George E. Clark, was to receive \$82,514.50, less attorneys' fees and expenses. The defendant refused to authorize the disbursement of the settlement proceeds and still refuses to authorize the disbursement of the settlement proceeds in accordance with the disbursement schedule which was prepared by counsel for the parties.

"3. At the trial of the damage action in Duplin County, the plaintiff offered evidence that it had paid George E. Clark the sum of \$27,485.50 pursuant to a fire insurance policy on the building owned by the defendant. Prior to the settlement of the property damage action and prior to the entry of a judgment dismissing the property damage action, the defendant inquired of Perry C. Henson as to whether the plaintiff would accept less than its full payment to the defendant in settlement of its claim for damages against the defendant in the damage action. Perry C. Henson asked Robert E. Dietz, Claims Manager, if the plaintiff would accept something less than full payment in settlement of its claim for damages and Robert E. Dietz told Perry C. Henson that the plaintiff would not accept anything less than full reimbursement in settlement of the case. Perry C. Henson told the defendant that the plaintiff in this action would not accept anything less than full reimbursement of the amount paid him in settlement of that action.

"4. At the time the defendant agreed to accept the sum of \$110,000.00 in full settlement of the entire claim for damages to the building and personal property of the defendant, the defendant knew that his insurance company

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had already paid him the sum of \$27,485.50, that his insurance company had pursued its subrogation claim from the very outset of the case, that the plaintiff herein was an additional plaintiff in the property damage action, that the amount of the loss which the plaintiff herein had paid to the defendant herein was offered into evidence, that the plaintiff herein refused to accept any amount less than full reimbursement of the property damage action, and that the settlement of the case for \$110,000.00 included the subrogation claim of the plaintiff. At the time of the settlement conference between the defendant and the attorneys, the defendant did not even ask any of the attorneys to adjust the settlement as between the defendant and the plaintiff. When George E. Clark authorized his attorneys to settle the entire case for \$110,000.00, he was agreeing to accept the sum of \$82,514.50 as his part of the overall settlement and he knew that the plaintiff was to have \$27,485.50 as its part of the overall settlement."

Judgment was entered for Pennsylvania for \$27,485.50 from the settlement proceeds and the sum of \$842.26 as reimbursement for the pro rata share of Clark of the bill for engineering services. Defendant Clark appealed to this Court.

Smith, Moore, Smith, Schell & Hunter, by Stephen P. Millikin, for plaintiff appellee.

Gunn & Messick, by Robert L. Gunn, for defendant appellant.

BALEY, Judge.

Defendant contends that the evidence was insufficient to show an agreement for the distribution of proceeds received from the settlement in the negligence action. The trial court has found as a fact that defendant agreed to accept the settlement and knew that plaintiff was to have \$27,485.50 as its part of the settlement. The court also found that defendant agreed to reimburse plaintiff for his pro rata share of the engineering expense.

"Where issues of fact are tried by the court without a jury, the trial judge becomes both judge and jury, and his findings of fact, if supported by competent evidence, are as conclusive on appeal as the verdict of a jury. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E. 2d 149. . . ." *McMichael v. Motors, Inc.*,

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14 N.C. App. 441, 445, 188 S.E. 2d 721, 723. This is true even though there is evidence which would support contrary findings, and even though some incompetent evidence may have been admitted. *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373; 1 Strong, N. C. Index 2d, Appeal and Error, § 57, pp. 223-241, and cases cited.

It is clear in the instant case that the evidence of plaintiff although sharply disputed by the defendant was sufficient to support the findings of fact of the court. The witness, Perry C. Henson, testified at length about the negotiations for settlement, the agreement for distribution of the proceeds of the settlement, and the understanding of the parties concerning expenses. His version of the facts was accepted by the trial court.

We have examined carefully all assignments of error brought forward by defendant and find them to be without merit.

Affirmed.

Judges BRITT and HEDRICK concur.

ANN D. PENDERGRAFT v. ROBERT L. PENDERGRAFT, SR.

No. 7421DC707

(Filed 16 October 1974)

1. Appeal and Error § 42— evidence omitted from record on appeal— presumption of sufficiency

Evidence presented at a child custody and support hearing not brought forward in the record on appeal will be presumed sufficient to support the findings of fact.

2. Divorce and Alimony § 24— adulterous parent— right to custody

A parent who commits adultery does not by this fact alone become unfit to have custody of children.

3. Divorce and Alimony §§ 23, 24— child support and custody— sufficiency of factual finding

Findings of fact by the trial court that plaintiff devoted attention to the needs of her children, that occasional overnight visits of a man not her husband were not injurious to the children, that plaintiff had had surgery and could not assume full-time employment, that plaintiff's income was small, irregular and insufficient to provide adequately for the children, and that defendant was healthy and gain-

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fully employed as a truck driver with an income in excess of \$14,000 in 1973 were sufficient to support the trial court's conclusion that plaintiff was a fit and proper person to have custody of the children and to support the court's award of child support.

4. Divorce and Alimony § 23— child support and custody—award of counsel fees proper

The trial court in this child custody and support case properly allowed counsel fees as authorized by G.S. 50-13.6 where the facts found showed that plaintiff had insufficient means to defray the expense of suit and acted in good faith to secure adequate support for her children which defendant had refused to furnish.

APPEAL by defendant from *Clifford, Judge*, 11 April 1974 Session of District Court held in FORSYTH County.

Heard in Court of Appeals 29 August 1974.

This is an action brought by plaintiff-wife against defendant-husband for custody of minor children, support for the children, and attorney fees.

Under a separation agreement entered 23 March 1973, plaintiff received custody of four minor children and defendant agreed to pay plaintiff forty dollars per week for their support. Prior to the institution of this action, one of the minor children married and is emancipated.

Defendant filed answer in which he asked that he be awarded custody of the children because plaintiff was living in adultery with another man and was not a fit and proper person to have custody of her children.

Upon the hearing the court awarded custody of the children to plaintiff with reasonable visitation privileges to defendant "at such times as agreeable between the parties, provided defendant gives plaintiff twenty-four hours notice." Defendant was directed to pay \$25.00 per week per child for support, provide medical and hospital insurance for the three children, and pay \$350.00 as attorney fees.

Defendant appealed to this Court.

Wilson and Morrow, by John F. Morrow, for plaintiff appellee.

Kennedy and Kennedy, by Annie Brown Kennedy, for defendant appellant.

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BALEY, Judge.

[1] The evidence presented at the hearing in the trial court is not brought forward in the record and will be presumed to be sufficient to support the findings of fact. *Carter v. Carter*, 232 N.C. 614, 61 S.E. 2d 711; *Christie v. Powell*, 15 N.C. App. 508, 190 S.E. 2d 367, *cert. denied*, 281 N.C. 756, 191 S.E. 2d 361. But defendant contends that the findings of fact are not sufficient to support the order of the court awarding custody of the children to the plaintiff, granting support for the children, and directing the payment of attorney fees.

"It is not necessary for the trial judge to make detailed findings of fact upon each item of evidence offered at trial. It is necessary, however, that he make the material findings of fact which resolve the issues raised. In each case the findings of fact must be sufficient to allow an appellate court to determine upon what facts the trial judge predicated his judgment." *Morgan v. Morgan*, 20 N.C. App. 641, 642, 202 S.E. 2d 356, 357.

[3] Here there are extensive findings of fact showing the attention devoted by plaintiff to the needs of her children which support the conclusion that she was a fit and proper person to have their custody. The presence of another man upon occasional overnight visits was not found to be injurious to the children, and, in fact, his financial assistance in helping to make house payments and provide other support enabled plaintiff to meet necessary expenses.

[2] The guiding principle to be used by the court in determining custody is the welfare of the children involved. *Stanback v. Stanback*, 270 N.C. 497, 155 S.E. 2d 221; 3 Strong, N. C. Index 2d, Divorce and Alimony, § 24. A parent who commits adultery does not by this fact alone become unfit to have custody of children. *Savage v. Savage*, 15 N.C. App. 123, 189 S.E. 2d 545, *cert. denied*, 281 N.C. 759, 191 S.E. 2d 356. The trial court has broad discretion in deciding individual cases of child custody. *Swicegood v. Swicegood*, 270 N.C. 278, 154 S.E. 2d 324. In this case the facts found fully support the award of custody.

[3] The court found that the itemized monthly expenses of plaintiff in connection with the support of the minor children amounted to approximately \$700.00 per month. The \$40.00 per week paid by defendant pursuant to the deed of separation was clearly not adequate to provide for the needs of the children. Plaintiff had been hospitalized for surgery during the separa-

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tion period and was not physically able to assume full-time employment. Her income was small and irregular and insufficient to defray these expenses. Defendant was found to be a healthy, able-bodied man, gainfully employed as a truck driver with Branch Motor Lines earning in excess of \$14,000.00 in 1973. These findings of fact provide a sufficient basis for the award of child support, and the amount is a matter for the determination of the trial judge reviewable only in case of abuse of discretion. *Coggins v. Coggins*, 260 N.C. 765, 133 S.E. 2d 700.

[4] The allowance of counsel fees in actions for custody and support of minor children has been authorized by G.S. 50-13.6. The facts found in this case are ample to meet the requirements of that statute. They show that plaintiff had insufficient means to defray the expense of suit and acted in good faith to secure adequate support for her children which defendant had refused to furnish. The amount allowed as attorney fee was within the discretion of the court, and we find no abuse of that discretion.

Finally defendant contends that the order granting visitation privileges made agreement of both parties a prerequisite for permitting him to visit with his children and is, therefore, improper. There is nothing in the facts found which indicates that defendant by his conduct has forfeited any right of visitation, and it seems evident that the court has concluded that he should be allowed visitation privileges. The agreement of the parties relates to convenience of time and place rather than the visitation right itself and is an effort on the part of the court to give some latitude to the parties in affording access to the children without requiring specificity. It is not contemplated that such agreement would be withheld arbitrarily and without reasonable cause. If this occurs, a petition to the court would enable defendant to secure appropriate relief.

The findings of fact are full and comprehensive and support the judgment of the trial court.

Affirmed.

Judges BRITT and HEDRICK concur.

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STATE OF NORTH CAROLINA v. JOHNNY J. HAMILTON

No. 7420SC558

(Filed 16 October 1974)

1. Homicide § 21— motion for nonsuit — failure to consider evidence of self-defense — no error

The trial court in a second degree murder case did not err in denying defendant's motion for nonsuit, though defendant testified that he shot his victim in self-defense, since the court was required to consider only the evidence favorable to the State in ruling on defendant's motion.

2. Homicide § 27— instruction on lesser degree of crime — quantum of proof required

The trial court's instruction to the jury that "in order to reduce the crime to manslaughter, the defendant must prove, not beyond a reasonable doubt, but simply to your satisfaction, that there was no malice on his part" was proper, though the court did not explain the difference between the terms "beyond a reasonable doubt" and "to your satisfaction."

3. Criminal Law § 122— jury request for further instructions

The trial court, in complying with the jury's request to define again the difference between murder in the second degree and manslaughter, was not required to repeat his entire charge.

APPEAL by defendant from *Seay, Judge*, 7 January 1974 Session of Superior Court held in RICHMOND County. Heard in the Court of Appeals 4 September 1974.

Defendant was charged in a bill of indictment with murder in the first degree. At trial the solicitor announced that the State would not seek a conviction of murder in the first degree but would seek a conviction of either murder in the second degree or manslaughter.

The State's evidence showed that on 24 September 1973 Lacy Goins and William Clay Leak went to a farm owned by Leak. The defendant lived on the farm. When they arrived, the defendant was seated on the porch steps holding a 12-gauge shotgun. Leak got out of the car and approached the defendant. Goins, Leak's employee, went to a side building to get some building supplies. He testified that he heard a shot, turned around, and witnessed the defendant shoot Leak. Goins stated that Leak had no weapon at the time he was shot by the defendant. Deputy Sheriff Sanders of the Richmond County Sheriff's Department testified that he found Leak's body about 50 feet

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from the house but that there was blood about 25 feet from the house. Dr. Homer Bodiford stated that Leak died of severe hemorrhage and a collapsed lung. On cross-examination he testified that had Leak's left arm been down by his side, "it would have been within the pattern of the shot as they struck his chest."

Defendant's evidence showed that he had worked for Leak until 20 September 1973, when he quit in a dispute over Leak's use of his truck. On 24 September 1974 the defendant saw Leak at a parking lot in Highland Pines. Leak, who was seated in a car, told the defendant to get in the car. When defendant, who was leaning against the front passenger door of Leak's car, refused, Leak slid across the front seat and struck him. The defendant testified that he went home. Leak arrived, "cussing and raising sand," and advanced on the defendant. The defendant stated that he fired a warning shot, whereupon Leak grabbed a shovel and continued his advance. The defendant contends that he then shot Leak in self-defense.

Defendant was found guilty of murder in the second degree and sentenced to a term of 25 to 30 years in prison.

Attorney General Carson, by Assistant Attorney General Briley, for the State.

Cashwell and Ellis, by B. Craig Ellis, for the defendant.

BROCK, Chief Judge.

[1] Defendant contends that the trial court committed error in refusing to allow defendant's motion as of nonsuit at the conclusion of all the evidence due to the defendant's testimony concerning self-defense.

On motion to nonsuit the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom. Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve and do not warrant nonsuit. Only the evidence favorable to the State is considered, and defendant's evidence relating to matters of defense or defendant's evidence in conflict with that of the State is not considered. *State v. Henderson*, 276 N.C. 430, 173 S.E. 2d 291; 2 Strong, N. C. Index 2d, Criminal Law, § 104. In *State v. Everette*, 284 N.C. 81, 85, 199 S.E. 2d 462, the court stated: "In passing upon the sufficiency of the State's evidence to carry

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the case to the jury, the trial court in the present case was not required to consider defendant's testimony concerning self-defense. Therefore, the court properly refused to enter judgment as of nonsuit for defendant." This assignment of error is overruled.

[2] Defendant contends that the trial court committed error in its charge to the jury. The trial judge charged: "In order to reduce the crime to manslaughter, the defendant must prove, not beyond a reasonable doubt, but simply to your satisfaction, that there was no malice on his part." Defendant argues that the court erred when it failed to explain the difference between the terms "beyond a reasonable doubt" and "to your satisfaction."

"[W]hen the burden rests upon an accused to establish an affirmative defense . . . the *quantum* of proof is to the satisfaction of the jury—not by the greater weight of the evidence nor beyond a reasonable doubt—but *simply to the satisfaction of the jury.*" *State v. Freeman*, 275 N.C. 662, 666, 170 S.E. 2d 461. In *Freeman* the court held that "'[T]he accepted formula and the one that should be used if risk of error is to be avoided, is that the defendant has the burden of proving his defense (or mitigation) 'to the satisfaction of the jury—not by the greater weight of the evidence nor beyond a reasonable doubt—but simply to the satisfaction of the jury.' " 275 N.C. at 666.

This Court has held that a charge identical to the charge of which the defendant complains did not constitute error:

Although the trial judge would have been well advised to have used the above-quoted language from the *Freeman* case, we are of the opinion and so hold that when the charge is read as a whole, no prejudicial error appears therein with respect to the intensity of proof required of a defendant in order to establish the defense of self-defense. *State v. Richardson*, 14 N.C. App. 86, 88, 187 S.E. 2d 435, *cert. denied*, 284 N.C. 258, 200 S.E. 2d 658.

Defendant's argument is without merit.

[3] After retiring to consider its verdict, the jury returned and requested the court to define again the difference between murder in the second degree and manslaughter. The trial judge repeated his charge on the difference between the two offenses. Defendant assigns this as error, contending that compliance with

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the jury's request failed to leave open the possibility that the jury could still find the defendant not guilty. This contention has no merit. "[A] judge who is requested by the jury to reiterate his instructions on some particular point is not required to repeat his entire charge." *State v. Dawson*, 278 N.C. 351, 365, 180 S.E. 2d 140.

Defendant contends that the court committed error in failing to set aside the verdict as being contrary to the evidence. For reasons set forth above, this assignment of error is overruled.

It is our opinion that defendant received a fair trial free from prejudicial error.

No error.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. HUBERT WESLEY LEDFORD

No. 7329SC700

(Filed 16 October 1974)

Narcotics § 4— possession of LSD — insufficiency of evidence

Trial court erred in failing to grant defendant's motion for non-suit in a prosecution for possession of LSD where such evidence tended to show that defendant was seen in an area where, shortly thereafter, contraband material was found, but the area was a public place, and other persons were also observed apparently picking up objects from the ground, but there was no evidence as to what these objects were, and they obviously could not have been the identical objects which officers later discovered and found to be contrabrand; and defendant's flight under the circumstances only added to the suspicion of his guilt and furnished no substantial evidence thereof.

APPEAL by defendant from *Thornburg*, Judge, May 1973 Criminal Session of Superior Court held in RUTHERFORD County.

Defendant was indicted for unlawful possession of the controlled substance, LSD, and pled not guilty. The State's evidence showed:

On Saturday evening, 2 January 1973, Officer Wilkins of the Forest City Police Department concealed himself so that,

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with the aid of binoculars, he could observe the lighted parking lot and the picnic area behind the Little Mint Drive-In in Forest City. Wilkins, using a walkie-talkie, was in radio contact with two other policemen in the immediate vicinity, Officers Walker and Gee. There was considerable activity at the drive-in, with cars frequently coming and going. Wilkins observed defendant at the parking lot in the company of his sister and several other persons, one of whom was a young boy named Sonny Tessnear. On several occasions Tessnear was seen to leave the group and go over to a newly arrived automobile, where he appeared to engage in conversation for a short time. Tessnear would then walk to a place behind the picnic area pavilion and then return to the car, where an exchange of some kind would take place. Defendant, his sister, and Tessnear then left in an automobile driven by defendant. They returned a short while later, and Officer Wilkins observed defendant walk back of the picnic area, where he began to gather or pick up several objects. Wilkins then radioed to Officer Walker, who drove his patrol car near to the place where Wilkins had seen defendant squatting down and picking up objects. As Officer Walker got out of the patrol car and started in defendant's direction, defendant stood up and walked out to meet him. Walker noticed that defendant's shirt pockets appeared to bulge, and he asked defendant if he would mind showing what he had. Defendant started taking objects from his pants pockets and removed a pack of cigarettes from one of his shirt pockets. When Walker asked defendant what else he had in his pockets and requested him to step in front of the patrol car, defendant ran. Walker gave chase but could not catch him, and defendant was not arrested until some days later.

After defendant ran, Officer Wilkins, who had remained in position where he could observe the area through his binoculars, contacted Officer Gee by radio and guided him to the spot toward the rear of the picnic area where he had observed defendant appear to pick up objects. There Gee discovered in close proximity a brown bag containing nine syringes, a small matchbox containing 20 small purple pills, and a bottle containing 13 pills. Subsequent laboratory analysis disclosed that the pills contained LSD.

Defendant testified and denied that he had ever possessed LSD or any other drugs. He testified that he ran only because he was scared, that Officer Walker had not arrested him, and as defendant started walking away, "it looked like he [Walker] was reaching for something," and it scared defendant. Defend-

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ant and his sister also testified that earlier in the evening the police had stopped the car in which they and Sonny Tessnear were riding and that the officers had searched the car and found nothing.

The jury found defendant guilty as charged and judgment was entered sentencing him to prison for not less than three nor more than five years. Defendant appealed.

Attorney General Robert Morgan by Associate Attorney Robert P. Reilly for the State.

Robert L. Harris for defendant appellant.

PARKER, Judge.

Defendant assigns error to the denial of his motion for nonsuit made at the close of all of the evidence. It is familiar learning that upon a motion for judgment as of nonsuit in a criminal action, the evidence must be considered in the light most favorable to the State and the State given the benefit of every reasonable inference arising therefrom. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971); *State v. Vincent*, 278 N.C. 63, 178 S.E. 2d 608 (1971). The question for the court is whether, when all of the evidence is so considered, there is substantial evidence to support a finding both that the offense charged has been committed and that the defendant committed it. "If, when the evidence is so considered, it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion for nonsuit should be allowed." *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967). This is true even though the suspicion aroused by the evidence is strong. *State v. Chavis*, 270 N.C. 306, 154 S.E. 2d 340 (1967).

Applying the foregoing principles to the evidence in this case, we find it sufficient to raise a strong suspicion of defendant's guilt but not sufficient to take that issue beyond the realm of suspicion and conjecture. Defendant was seen in an area where shortly thereafter, the contraband material was found, but it was a public place and other persons were also observed in the immediate area. Defendant was observed apparently to pick up objects from the ground, but there was no evidence as to what these objects were and obviously they could not have been the identical objects which the officers later discovered and found to be contraband. Defendant ran, but his flight under

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the circumstances here disclosed does no more than merely add to the suspicion of his guilt and furnishes no substantial evidence thereof.

In our opinion the motion for nonsuit should have been allowed. Accordingly, the judgment appealed from is

Reversed.

Judges BRITT and HEDRICK concur.

JAMES WESLEY SPIVEY, ADMINISTRATOR OF THE ESTATE OF BARBARA J. GARNER SPIVEY, DECEASED v. MATTIE MATTHEWS WALDEN

No. 7415SC615

(Filed 16 October 1974)

1. Automobiles § 75— stopping on highway — contributory negligence

In a wrongful death action growing out of a rear-end collision, there was sufficient evidence that the negligence of plaintiff's intestate in stopping her car on the highway was a proximate cause of the collision for submission of an issue of contributory negligence to the jury.

2. Automobiles § 75—stopping or parking on highway

The jury could find that plaintiff's intestate violated G.S. 20-161 by stopping her automobile in the highway with intent to park or leave it standing for a sufficient length of time to break the continuity of travel where there was evidence tending to show that a friend of plaintiff's intestate pulled into an intersecting road and motioned to plaintiff's intestate to stop, that plaintiff's intestate stopped her automobile past the intersection in the right-hand traffic lane, and that while the automobile was stopped it was struck from the rear by defendant's automobile.

3. Automobiles § 90— negligence in stopping on highway — charge on contentions

The trial court did not err in charging on defendant's contention that plaintiff's intestate was guilty of negligence when she stopped on the highway since there was no evidence indicating that she stopped for any necessary purpose.

APPEAL by plaintiff from *Clark, Judge*, 18 March 1974 Session of CHATHAM Superior Court. Heard in the Court of Appeals 18 September 1974.

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This is an action for recovery of damages for the wrongful death of plaintiff's intestate, Barbara J. Garner Spivey (Mrs. Spivey), and damages to her automobile, allegedly resulting from the negligence of the defendant, Mattie Matthews Walden, (Mrs. Walden), when defendant's automobile collided with the rear end of the Spivey automobile apparently killing Mrs. Spivey instantly.

It was stipulated that the collision occurred on Thursday, 26 October 1972, at approximately 5:25 p.m. on U. S. Highway No. 421 about 0.3 miles south of Siler City, N. C.; that plaintiff's intestate, Mrs. Spivey, was driving a 1959 Model MG automobile and the defendant, Mrs. Walden, was driving a 1966 Model Buick; that both automobiles were travelling south on Highway 421; that the posted speed limit was 60 miles per hour and that the highway consisted of four traffic lanes, two for southbound traffic and two for northbound traffic.

The plaintiff's uncontradicted evidence showed the following facts: As Mrs. Spivey was proceeding in the right-hand, southbound lane, a friend, Mrs. Barbara Teague (Mrs. Teague) passed her in the left-hand, southbound lane, and motioned to Mrs. Spivey with her hand. Then, Mrs. Teague pulled in the right-hand lane, in front of Mrs. Spivey, and drove to the intersection of State Road 1124, where she turned right into the intersecting road. As Mrs. Spivey proceeded through the intersection on Highway 421, Mrs. Teague again motioned to her and Mrs. Spivey stopped her automobile south of the intersection in the right-hand traffic lane of Highway 421. While the Spivey automobile was stopped, it was struck from the rear by Mrs. Walden's automobile which also was proceeding south in the right-hand traffic lane.

The plaintiff also offered evidence tending to show that when Mrs. Spivey stopped, she had her right turn signal blinking; that the Spivey automobile had been stopped for only a few seconds when it was struck by the Walden automobile, and that no intervening southbound traffic had passed the Spivey automobile from the time it stopped until it was struck by the Walden automobile.

The defendant's evidence tended to show that the Spivey automobile was a small black MG sports car; that the traffic on Highway 421 at the time of the accident was heavy; that defendant was travelling at a speed of about 50 miles per hour,

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well within the maximum posted speed limit of 60 miles per hour; that as the defendant approached the intersection of Highway 421 and State Road 1124 she observed the Teague automobile on her right, that she saw it backing into Highway 421 and then going forward as though to enter the highway; that her view of Mrs. Spivey's sports car was obstructed by the Teague automobile; that when defendant finally saw the sports car and before she realized it was not moving, she was very close to it; that she saw no signal from the car indicating that Mrs. Spivey intended to stop or that she was parked in her lane of travel and that she swerved to the left in an effort to avoid the collision but despite her best efforts her automobile struck Mrs. Spivey's car in the left rear.

At the close of the evidence the jury found plaintiff's intestate, Barbara Spivey, was killed by the negligence of the defendant and that the decedent by her own negligence contributed to her death. Based on these findings the court ordered that the plaintiff take nothing by this action and dismissed the claim against the defendant. Plaintiff appealed.

William W. Staton for plaintiff appellant.

L. T. Dark, Jr., for defendant appellee.

MORRIS, Judge.

[1] Plaintiff's first assignment of error concerns the submission of the issue of contributory negligence to the jury. The plaintiff argues that even though there might have been evidence of contributory negligence, there was not sufficient evidence of proximate cause to permit the issue to be submitted to the jury. We find no merit in this contention. Proximate cause has been defined by our courts as " 'a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence' could have reasonably foreseen that some injury or harm would probably result from his act or omission under all the facts as they existed. (Citations omitted.)" *Boone v. R. R.*, 240 N.C. 152, 81 S.E. 2d 380 (1954). In *Bass v. McLamb*, 268 N.C. 395, 150 S.E. 2d 856 (1966), Justice Branch quoted from *Saunders v. Warren*, 267 N.C. 735, 149 S.E. 2d 19 (1966), as follows:

“ “ The operator of a standing or parked vehicle which constitutes a source of danger to other users of the high-

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way is generally bound to exercise ordinary or reasonable care to give adequate warning or notice to approaching traffic of the presence of the standing vehicle, and such duty exists irrespective of the reason for stopping the vehicle on the highway. So the driver of the stopped vehicle must take such precautions as would reasonably be calculated to prevent injury, whether by the use of lights, flags, guards, or other practical means, and failing to give such warning may constitute negligence . . . " 60 C.J.S., Motor Vehicles, § 325, pp. 779, 780; *Mullis v. Pinnacle Flour & Feed Co.*, 152 S.C. 239, 149 S.E. 329.' " *Bass v. McLamb*, *supra*, at 397, 398.

There was sufficient evidence of proximate cause in this case for submission of the issue of contributory negligence to the jury.

[2] Plaintiff next contends that the trial court erred in applying the provisions of G.S. 20-161 to the facts in this case. He submits that the applicability of the statute on the issue of contributory negligence was too speculative to be left to the jury. The pertinent portion of G.S. 20-161 reads as follows:

"(a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or main traveled portion of any highway or highway bridge unless the vehicle is disabled to such an extent that it is impossible to avoid stopping or temporarily leaving the vehicle upon the paved or main traveled portion of the highway or highway bridge."

We agree with plaintiff that G.S. 20-161 is not violated when the operator of a motor vehicle stops momentarily upon the streets or highway in order to undertake another movement and that the words "park" and "leave standing" as used in the statute do not include "a mere temporary or momentary stoppage on the highway for a necessary purpose when there is no intent to break the continuity of travel". *Faison v. Trucking Co.*, 266 N.C. 383, 390, 146 S.E. 2d 450 (1966). In fact, we note that the judge so charged the jury in stating defendant's contention that G.S. 20-161 was applicable in this case. However, we conclude that based upon all the evidence the jury could reasonably find that when Mrs. Spivey stopped her automobile she intended to park or leave it standing a sufficient length of time to break the continuity of travel. There was no error in

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submitting the question of whether the statute was applicable in this case to the jury.

[3] Plaintiff's final contention is that the trial court erred when it instructed the jury that the plaintiff's intestate was guilty of negligence when she stopped on the highway if there was no necessary purpose to the stopping. This contention also is without merit. The portion of the charge to which the plaintiff objects was in fact only a statement by the trial judge of one of the defendant's contentions. Defendant alleged in her answer and argued to the jury that Mrs. Spivey violated G.S. 20-161 and that such violation constituted contributory negligence on her part. She further contended there was nothing from the evidence indicating Mrs. Spivey stopped for any necessary purpose. We find the court accurately stated the defendant's contentions. This assignment of error is overruled.

No error.

Chief Judge BROCK and Judge MARTIN concur.

SHARON ELAINE JOHNSON v. MAROLYN GRACE BROOKS

No. 7423SC551

(Filed 16 October 1974)

1. Automobiles § 46; Evidence § 42— driving “a little too fast” — no shorthand statement of fact

Testimony by plaintiff passenger that defendant was driving “a little too fast” was not admissible as a shorthand statement of fact and was properly excluded by the court.

2. Automobiles § 60— skidding on ice — insufficient evidence of negligence

Plaintiff passenger's evidence was insufficient to be submitted to the jury on the issue of negligence by defendant driver where it tended to show only that defendant's automobile skidded on ice as it entered a curve traveling 40 to 45 mph and struck an embankment, and that defendant had made two previous trips over the same road on the day of the accident.

APPEAL by plaintiff from *Collier, Judge*, 21 January 1974 Session of Superior Court, WILKES County. Heard in the Court of Appeals 5 September 1974.

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This is a civil action instituted for the recovery of damages for personal injuries allegedly resulting from an automobile collision which occurred on Highway 268 in Wilkes County on 13 January 1973. The plaintiff was a guest passenger in the defendant's vehicle. At the conclusion of the plaintiff's evidence, defendant's motion for a directed verdict under Rule 50(b) was granted. Plaintiff appealed.

Additional facts necessary for decision are set forth in the opinion.

McElwee, Hall and McElwee, by William H. McElwee III, for plaintiff appellant.

Hudson, Petree, Stockton, Stockton and Robinson, by James H. Kelly, Jr., for defendant appellee.

MORRIS, Judge.

[1] Plaintiff first contends that the trial court erred in sustaining defendant's objection to the testimony of plaintiff that defendant was driving the automobile "a little too fast" and instructing the jury to disregard this testimony. Plaintiff's argument is that she should have been allowed to testify that she realized defendant was going too fast and that she did not say anything to the defendant because she was afraid it would make the defendant mad. In support of her contention plaintiff cites the well-established principle of law that "[a] lay witness is permitted to give his opinion as to common appearances, facts and conditions in those instances where the basic facts cannot be described so as to enable a person who is not an eyewitness to form an accurate judgment in regard thereto, provided that such 'shorthand' statement is descriptive of facts observed by the witness." (Emphasis supplied.) 3 Strong, N. C. Index 2d, Evidence, § 42, p. 669. While we recognize this principle as the law in North Carolina, we hold it is not applicable in this case. Here the question of whether defendant was driving too fast was an issue for the jury based on the evidence introduced at trial. Basic facts concerning such matters as the posted speed limit, the weather and the mechanical condition of defendant's automobile could have been described with sufficient clarity to allow members of the jury to draw their own conclusions regarding the speed of defendant's car. As a matter of fact, plaintiff did testify as to the actual speed of the defendant's automobile at the time of the accident. This assignment of error is overruled.

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[2] Plaintiff next contends that the trial court erred in granting the defendant's motion for a directed verdict under Rule 50 at the conclusion of the plaintiff's evidence. The sole question presented by this assignment of error is whether the plaintiff offered sufficient evidence of defendant's negligence to require submission of the case to the jury. We conclude that she did not.

Plaintiff's evidence tended to show that plaintiff and defendant were roommates and were in the process of moving to a new location at the time of the accident; that it had snowed on the Sunday approximately six days before the accident, and there was still some ice in the curves and low places on the road on which they were travelling; that they had made two previous trips over the same road on the day of the accident; that in her opinion defendant drove the automobile at a speed of 40 to 45 miles per hour over a road known to her (plaintiff) to have ice and snow on the road in curves and low places; that defendant did not reduce her speed or take any other precaution upon entering the curve immediately preceding the accident and that while in the curve the defendant's automobile skidded into an embankment causing plaintiff to sustain substantial injuries.

There was no evidence that either plaintiff or defendant was aware there was ice on the curve before the accident occurred. The fact that the parties had made two previous trips over the same road on the day of the accident without trouble could just as well negate knowledge on the part of the defendant as establish such knowledge. Thus it seems clear that all the plaintiff showed by her evidence was that the defendant's automobile skidded into an embankment as it entered a curve at a time when it was travelling 40 to 45 miles per hour. This alone was insufficient to get to the jury.

It is well established in North Carolina that one is not guilty of negligence *per se* in driving an automobile on a highway covered with snow or ice. *Bass v. McLamb*, 268 N.C. 395, 150 S.E. 2d 856 (1966). Furthermore, the mere skidding of an automobile is not in itself, and without more, evidence of negligence. *Webb v. Clark*, 264 N.C. 474, 141 S.E. 2d 880 (1965). Since it is not before us, we do not discuss the question of plaintiff's contributory negligence.

Defendant's motion for a directed verdict under Rule 50(b) was properly granted.

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Affirmed.

Chief Judge BROCK and Judge MARTIN concur.

MARY ALMA HINES, PLAINTIFF v. THOMAS W. PIERCE, DEFENDANT
AND THIRD PARTY PLAINTIFF v. R. P. CRAVEN AND WIFE, CLADIE
CRAVEN AND K. V. BRILES AND WIFE, INA BRILES, THIRD PARTY
DEFENDANTS

No. 7419SC675

(Filed 16 October 1974)

1. Trespass to Try Title § 4— insufficiency of evidence of title

In an action to recover damages for the removal of timber wherein title to the land in question was disputed, the trial court properly granted defendant's motion for directed verdict where plaintiff failed to prove title by any of the methods stated in *Mobley v. Griffin*, 104 N.C. 112, and failed to show that the area from which the timber was removed is embraced within the description in her deeds.

2. Boundaries § 8— directed verdict in trespass to try title action — effect on processioning proceeding

The allowance of defendant's motion for directed verdict on plaintiff's claim for damages for removal of timber did not prejudice her processioning proceeding to establish the true boundary line where the motion was made and allowed in the absence of the jury.

3. Trial § 10; Rules of Civil Procedure § 51— remarks of court — no expression of opinion

Trial court's remarks with reference to plaintiff's evidence and counsel did not constitute an expression of opinion in violation of Rule 51(a).

4. Costs § 4— surveyors' fee as part of costs

Where plaintiff failed to recover in an action involving title to real property in which a court survey was ordered, the trial court properly ordered the expense of the survey included in the costs taxed to the plaintiff, and a surveyor's fee of \$1,020 was reasonable in this case. G.S. 38-4(d).

APPEAL by plaintiff from *Crissman, Judge*, 4 February 1974 Session of Superior Court held in RANDOLPH County.

In her complaint, filed 17 May 1971, plaintiff alleged: She is the owner of a 47-acre tract of land, described in the complaint by courses and distances. On or about 15 March 1971, defendant entered upon plaintiff's land, cut and removed timber there-

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from, and continues to cut and remove plaintiff's timber. She asked for temporary and permanent injunctive relief and for monetary damages in amount of \$10,000.

In his answer, defendant denied plaintiff's title to the 47 acres of land described in the complaint, and denied cutting or removing any timber from, or in any way trespassing upon, any lands belonging to plaintiff. In a further defense, defendant alleged ownership of a 20.25-acre tract of land which he described by courses and distances. In a third party complaint, he brought in as third party defendants the persons who had conveyed the 20.25-acre tract to him by warranty deed.

On 22 September 1971, surveyors were appointed by the court "... to survey all lands in dispute according to the contentions of the plaintiff and the defendant and report the same with maps to this court." On 18 September 1973, the court entered an order allowing plaintiff to amend her complaint to allege a processioning "proceeding to establish a true boundary line between the plaintiff and the defendants." Plaintiff amended her complaint pursuant to the order and defendant filed answer to the amendment.

At the conclusion of plaintiff's evidence, defendant moved for a directed verdict as to plaintiff's claim for damages on the ground that plaintiff had failed to make out a prima facie case of title to the property within the area where she contends the timber was cut. The motion was overruled and defendant presented evidence. At the close of all the evidence, defendant renewed his motion for directed verdict and it was allowed.

As to the boundary dispute, the court submitted issues which were answered in favor of defendant. From judgment predicated on the verdict and taxing plaintiff with the costs, including a \$1,020 surveyors' bill, plaintiff appealed.

Ottway Burton for plaintiff appellant.

Miller, Beck, O'Briant and Glass, by Adam W. Beck, for defendant appellees.

BRITT, Judge.

[1] Plaintiff assigns as error the allowance of defendant's motion for directed verdict on plaintiff's claim for damages. This assignment has no merit.

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In 7 Strong, N. C. Index 2d, Trespass To Try Title, § 2, pp. 250-51, we find: "In an action in trespass to try title, defendant's denial of plaintiff's title and of the trespass places the burden upon plaintiff to prove title in himself and trespass by defendant. Plaintiff must rely on the strength of his own title, which he must establish by some recognized method. Further, plaintiff must not only show good paper title, he must also show that the area claimed is embraced within the descriptions in his instruments"

The methods recognized to establish title to real estate in this jurisdiction are enumerated in the often cited case of *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889). Plaintiff's proof of title failed to comply with any of the methods stated in *Mobley*. Furthermore, plaintiff failed to show that the disputed area from which the timber was cut and removed is embraced within the description in her deeds.

[2] Plaintiff further argues that the granting of defendant's motion for directed verdict on her claim for damages prejudiced her "processioning proceeding"; that it amounted to an expression of opinion by the trial judge. We reject this argument. The record reveals that the motions for directed verdict were made, and the second motion was allowed, in the absence of the jury. On the facts appearing, we hold that the court did not err in allowing the motion.

[3] By five assignments of error, plaintiff contends "[t]he adverse comments, remarks and language of the trial judge with reference to the plaintiff's evidence and plaintiff's counsel were of such antagonistic propensity toward the plaintiff that she was denied her right to a fair trial," in violation of G.S. 1A-1, Rule 51(a). The major portion of plaintiff's brief is devoted to a discussion of these assignments. Suffice it to say, we have carefully considered the assignments and find them to be without merit. It is well settled that it is the duty of the trial judge to supervise and control the trial to prevent injustice to either party, and in discharging that duty the trial judge has large discretionary powers. 7 Strong, N. C. Index 2d, Trial § 9, pp. 266-67. We hold that the trial judge did not abuse his discretion in the conduct of the trial in this case.

[4] Plaintiff assigns as error the action of the trial judge in ordering plaintiff, as a part of the costs, to pay the surveyors' bill of \$1,020. This assignment has no merit. Costs follow the

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final judgment, *Whaley v. Taxi Co.*, 252 N.C. 586, 114 S.E. 2d 254 (1960), and where judgment is rendered in a defendant's favor on the controverted issue, plaintiff is properly taxed with the costs. *Bundy v. Credit Co.*, 202 N.C. 604, 163 S.E. 676 (1932). Where a plaintiff fails to recover in an action involving title to real property in which a court survey is ordered, the trial judge has the authority and duty to order the expense of the survey included in the costs. G.S. 38-4 (d) (Supp. 1973); *Ipock v. Miller*, 245 N.C. 585, 96 S.E. 2d 729 (1957). There is no showing that the surveyors' bill in the case at bar was unreasonable.

We have considered the other assignments of error argued in plaintiff's brief but find them to be without merit.

No error.

Judges HEDRICK and BAILEY concur.

STATE OF NORTH CAROLINA v. CLINTES PERSON

No. 7414SC646

(Filed 16 October 1974)

1. Burglary and Unlawful Breakings § 5; Larceny § 7— larceny of TV from apartment — sufficiency of evidence

Evidence in a prosecution for felonious breaking and entering and felonious larceny was sufficient to withstand defendant's motion for nonsuit when it tended to show that defendant and two others were looking for a TV to steal, defendant and the State's main witness entered their victim's apartment and removed her TV, and defendant and his accomplices sold the TV to another upon payment of approximately \$50 to each of them.

2. Criminal Law § 122— additional instructions after retirement of jury — no coercion

Additional instruction given by the trial court to the jury after they had deliberated for two hours that some twelve jury members would have to decide the case and "... I am hoping that you can determine it," did not coerce the jury into returning a verdict of guilty.

APPEAL by defendant from *Brewer, Judge*, 4 February 1974 Criminal Session of Superior Court held in DURHAM County.

Defendant was charged with felonious breaking and entering and felonious larceny. He was found guilty on both counts

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and from judgment imposing prison sentence of five years on each count, to be served consecutively, he appealed.

Attorney General James H. Carson, Jr., by Associate Attorney Raymond L. Yasser, for the State.

Vann & Vann, by Arthur Vann, for the defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the failure of the court to grant his timely made motion for nonsuit. The evidence, viewed in the light most favorable to the State, tended to show: On 24 January 1973 Mrs. Alta Skinner left her apartment at 2836 Chapel Hill Road, Durham, at 7:30 p.m. and returned at about 10:00 or 10:30 p.m. She owned a 25-inch Zenith color television set that cost approximately \$625. The TV was in her apartment when she left, but when she returned it was gone and the sliding glass doors leading to the patio were open. The State's main witness, Danny Bell, was an accomplice in the alleged crime. He testified that on that evening he, the defendant, and Will Brown were looking for a TV to steal; that they noticed that no lights were on in Mrs. Skinner's apartment; that Brown remained in the car as a lookout and he and defendant went to the front door of the apartment; that he knocked and when no one answered, he opened the door with a plastic card; that he and defendant entered the apartment, took the TV, carried it through the sliding glass doors which they did not close, and carried it on to the car; that they unscrewed the legs of the TV and placed it in the car; that they then carried the set to Delatha Self who paid each of them approximately \$50.

We hold that the evidence was sufficient to survive the motion for nonsuit.

[2] Defendant assigns as error additional instructions given to the jury after the jury had deliberated for more than 2 hours. The record reveals:

"The Court: Members of the jury, I don't want any member of the jury to surrender any conscientious opinion that any member of the jury has about this matter, but you know the reason we select a jury and let the 12 jurors discuss the case is so that each member of the jury can express his or her opinion and also consider the opinion of the fellow jurors. It is very rare that all twelve would have the same

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opinion to begin with. We want the benefit of your combined judgment, and it may be that you have an idea that you want your fellow members to consider. Maybe some of the others have ideas that you ought to consider. In the final analysis, members of the jury, we are seeking to determine the truth of the matter, and so far as I know you members of the jury have all the information or all of the evidence available in the case.

"If we should have a failure of agreement now, it would mean that the case would have to be tried over again, which would mean added expense, and in its final analysis, some twelve members of the jury are going to have to decide this case, and inasmuch as you members of the jury have all the evidence any other twelve would have, I AM HOPING THAT YOU CAN DETERMINE IT. (Emphasis added.)

"As I stated at the outset, I do not ask and would not permit a single one of you members of the jury to participate in a verdict that did not reflect your conscientious opinion. I don't ask or want you to do that. I do want you to consider the views of each of the members of the jury. I might say there is not any reason to hurry in this case. You can take as much time as you desire in the deliberation and discussion of this case.

"The Court wants to emphasize the fact that it is the duty of jurors to do whatever they can to reason the matter over together as reasonable men and women and to reconcile the difference, if such is possible, without the surrender of conscientious convictions and to reach a verdict if you can. I will let you at this time retire to the jury room and resume your deliberations in this case."

Defendant contends that the instruction, "... I am hoping that you can determine it," constituted an expression of opinion by the trial judge in violation of G.S. 1-180. The assignment has no merit.

The North Carolina Supreme Court has spoken on this point. In *State v. Accor*, 281 N.C. 287, 290, 292, 188 S.E. 2d 332, 336 (1972), the court upheld additional instructions which contained the following: "... someone ultimately is going to have to decide this case in Gaston County and I hope it will be you." We hold that the additional instructions challenged here did not coerce the jury into returning a verdict of guilty.

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We have considered the other assignment of error argued by defendant and find that it too is without merit.

No error.

Judges CAMPBELL and VAUGHN concur.

LLOYD BENJAMIN PARKER, T/A LLOYD'S RESTAURANT AND
SMOKE STACK LOUNGE v. BOARD OF ALCOHOLIC CONTROL

No. 7410SC733

(Filed 16 October 1974)

1. Intoxicating Liquor § 2— findings of ABC Board — review

The findings of the State Board of Alcoholic Control, after proper hearing, are conclusive if supported by competent, material and substantial evidence.

2. Intoxicating Liquor § 2— suspension of licenses — improper storage of beverages — failure to keep roster of members

Suspension of petitioner's on-premises beer permit, social establishment permit, restaurant and related places permit and special occasion permit was supported by findings that petitioner failed to have alcoholic beverages stored in individual lockers on his licensed premises with the name of the beverage owner on the bottle and locker and failed to keep a current roster of all members and their addresses on the licensed premises.

APPEAL by petitioner from *McKinnon, Judge*, June 1974 Session of Superior Court held in WAKE County.

By this proceeding, petitioner challenges the suspension of the following permits issued to him in 1961 and 1967 by the North Carolina Board of Alcoholic Control: an on-premise beer permit; a Social Establishment permit; a Restaurant and Related Places permit; and a Special Occasions permit.

On 18 March 1974, after reviewing the entire transcript of a hearing conducted pursuant to proper notice, including the findings of fact and recommendations of Hearing Officer Biggers, and hearing the argument of petitioner's counsel, respondent, the State ABC Board, found as facts that the permittee (1) on or about September 28, 1973, at 10:45 p.m. and September 29, 1973, at 1:10 a.m., failed to have alcoholic beverages stored in individual lockers on his licensed premises with the name of the

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beverage owner on the bottle and locker, in violation of G.S. 18A-30(2) (c) and Social Establishment Regulations #3 and #4; (2) on said dates and at said hours failed to keep a current roster of all members and their addresses on his licensed premises, in violation of Social Establishment Regulation #1; (3) on said dates allowed his licensed premises to be open to the general public, in violation of G.S. 18A-30(2) by failing to keep a current roster of his members; and (4) on said dates and at said hours he failed to give his licensed premises proper supervision in violation of G.S. 18A-43(a) by failing to see that alcoholic beverages were properly stored and by failing to keep a current roster of members. Pursuant to said findings and conclusions, respondent ordered that petitioner's permits be suspended for a period of 45 days, effective 1 April 1974.

Petitioner excepted to respondent's order and filed a petition for judicial review in Wake County Superior Court. Upon petitioner's motion, a temporary stay of respondent's action was issued by Judge Smith on 29 March 1974 pending final judicial review.

On 10 July 1974, Judge McKinnon reviewed the decision of respondent and found:

The findings of fact and decision of the Respondent herein are supported by competent, material and substantial evidence in view of the entire record as submitted and the substantial rights of the Petitioner have not been prejudiced; that said decision is in compliance with applicable constitutional provisions, within the statutory authority or jurisdiction of the Respondent and pursuant to law and lawful procedure, is neither arbitrary nor capricious and upon the entire record the decision herein judicially reviewed should be affirmed.

Thereupon, Judge McKinnon entered judgment affirming the decision of respondent and dissolved the stay order theretofore entered. Petitioner appealed.

Attorney General James H. Carson, Jr., by Associate Attorney James Wallace, Jr., for respondent appellee.

Bridgers & Horton, by H. Vinson Bridgers, for petitioner appellant.

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BRITT, Judge.

Petitioner's sole exception is to the signing and entry of Judge McKinnon's judgment.

An exception to the signing and the entry of the judgment presents the question of whether error of law appears on the face of the record proper, which includes whether the facts found or admitted support the judgment and whether the judgment is regular in form, but the exception does not present for review the findings of fact or the sufficiency of the evidence to support them. *Hall v. Board of Elections*, 280 N.C. 600, 187 S.E. 2d 52 (1972); *Sternberger v. Tannenbaum*, 273 N.C. 658, 161 S.E. 2d 116 (1968); and, *Jackson v. Collins*, 9 N.C. App. 548, 176 S.E. 2d 878 (1970).

[1] The findings of the Board of Alcoholic Control, after proper hearing, are conclusive if supported by competent, material and substantial evidence. *C'est Bon, Inc. v. Board of Alcoholic Control*, 279 N.C. 140, 181 S.E. 2d 448 (1971); *Keg, Inc. v. Board of Alcoholic Control*, 277 N.C. 450, 177 S.E. 2d 861 (1970); *Freeman v. Board of Alcoholic Control*, 264 N.C. 320, 141 S.E. 2d 499 (1965); *Bergos v. Board of Alcoholic Control*, 15 N.C. App. 169, 189 S.E. 2d 494 (1972).

[2] We hold that the facts found or admitted fully support the respondent's order and the judgment appealed from, and that the order and judgment are regular in form. No error of law appears.

Affirmed.

Judges HEDRICK and BALEY concur.

DAVID EARL HOXENG v. SARAH A. THOMAS

No. 7415DC518

(Filed 16 October 1974)

Automobiles § 66— identity of driver — insufficiency of evidence

Plaintiff's evidence was insufficient to show that defendant was the driver of a station wagon that struck a telephone pole, causing wires to fall onto the highway in the path of plaintiff's vehicle, where it tended to show only that defendant was found sitting some five to

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fifteen feet from the station wagon and that defendant told plaintiff that there were other people in the station wagon.

APPEAL by plaintiff from *Paschall, Judge*, 29 January 1974 Session, ORANGE County District Court. Argued in the Court of Appeals on 17 September 1974.

Plaintiff instituted this action to recover damages resulting from the collision of plaintiff's car with telephone wires that had fallen across a highway in rural Orange County. Plaintiff alleged that defendant had negligently driven her car into a telephone pole causing wires to fall onto the highway. The evidence tended to show that after plaintiff's collision with the wires, he observed a station wagon car off the road and next to a telephone pole; that the station wagon appeared to be catching on fire; that plaintiff got out of his car and attempted to extinguish the fire; that defendant was found some five to fifteen feet from the station wagon; and that in response to a question from plaintiff, defendant said there were other people in the station wagon. A highway patrolman testified that tire impressions left the road and continued to where the station wagon had come to rest; that he had not talked with the defendant about the accident; and that he did not test defendant for alcohol consumption.

At the conclusion of plaintiff's evidence, defendant moved for a directed verdict pursuant to Rule 50 of the Rules of Civil Procedure. The trial court granted defendant's motion and plaintiff appealed.

Spears, Spears, Barnes, Baker & Boles, by Robert B. Jervis, for plaintiff appellant.

Haywood, Denny & Miller, by James H. Johnson III, for defendant appellee.

MARTIN, Judge.

Plaintiff's evidence merely tended to show that the defendant was found sitting some five to fifteen feet from the station wagon, and plaintiff had been told by defendant that there were other people in the car. There is no other evidence connecting defendant to the station wagon. The identity of the driver of an automobile may be established by circumstantial evidence, either alone or in connection with direct evidence. *Morris v. Bigham*, 6 N.C. App. 490, 170 S.E. 2d 534 (1969); *King v. Bonardi*, 267

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N.C. 221, 148 S.E. 2d 32 (1966); *Drumwright v. Wood*, 266 N.C. 198, 146 S.E. 2d 1 (1966).

"Inferences as to who was driving the automobile at the time of the wreck cannot rest on conjecture and surmise. *Parker v. Wilson*, 247 N.C. 47, 100 S.E. 2d 258; *Sowers v. Marley*, 235 N.C. 607, 70 S.E. 2d 670. The inferences permitted by the rule are logical inferences reasonably sustained by the evidence, when considered in the light most favorable to the plaintiff. *Whitson v. Frances*, 240 N.C. 733, 83 S.E. 2d 879." *Stegall v. Sledge*, 247 N.C. 718, 102 S.E. 2d 115 (1958).

In determining the sufficiency of the evidence to withstand a motion for a directed verdict made by defendant, all evidence which supports plaintiff's claim must be taken as true and considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in plaintiff's favor. *Ingold v. Light Co.*, 11 N.C. App. 253, 181 S.E. 2d 173 (1971). Plaintiff's evidence, considered in light of the foregoing rule, does not remove the identity of the driver of the station wagon from the realm of mere conjecture.

Affirmed.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. LOUIS L. McCAMBRIDGE, JR.

No. 7420SC575

(Filed 16 October 1974)

1. Larceny § 7—felonious larceny of copper wire—sufficiency of evidence of value

The State's evidence sufficiently established the value of wire allegedly stolen by defendant as exceeding \$200 where such evidence consisted of testimony that more than 1200 pounds of wire were stolen and the cost of the wire was \$1.65 per pound at the time it was bought.

2. Larceny § 8—felonious larceny of copper wire—instructions on value

In a prosecution for felonious larceny of copper wire, the trial court did not err in instructing the jury that the market value of

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the wire *in question* was \$1.65 per pound, since the testimony of the manager of the company which sustained the loss concerned value of the reels of wire which were stolen and not copper wire in general.

3. Larceny § 8— instructions taken as a whole

Trial court's instruction in a felonious larceny case, "if two or more persons act together with a common purpose, to commit larceny in this case, each of them is held responsible for the acts of the other done in commission of that crime," did not prejudice defendant when read as a whole.

APPEAL by defendant from *Winner, Judge*, 15 January 1974, Special Criminal Session, STANLY Superior Court. Argued in the Court of Appeals 4 September 1974.

Defendant was tried and convicted for the felonious larceny of copper wire having a value of more than \$200.00 and owned by his employer Federal Pacific Electric Company (hereinafter referred to as Company). A former co-worker of defendant testified that he and defendant took the wire on 13 September 1973, and defendant testified denying any participation in the larceny.

Attorney General Carson, by Deputy Attorney General R. Bruce White, and Assistant Attorney General Guy A. Hamlin, for the State.

Henry C. Doby, Jr., for defendant appellant.

MARTIN, Judge.

Defendant has brought and argued in his brief only five exceptions. Other exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned. Rule 28 of the "Rules of Practice in the Court of Appeals."

[1] Three exceptions form the basis of the first assignment of error in which defendant argues the case should have been dismissed because the State's evidence fails to establish the value of the wire as exceeding \$200.00. The manager of the Company gave the following testimony:

"A. There were six reels of two hundred and twenty-five pound average, better than twelve hundred pounds. . . .

Q. How much does your firm pay per pound for this copper?

A. A dollar sixty-five per pound.

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Q. Is that the going fair market price of copper?

A. That is in the condition it was brought in. It's a copper braid, and it's very expensive."

Value as used in G.S. 14-72 means fair market value. *State v. Cotten*, 2 N.C. App. 305, 163 S.E. 2d 100 (1968); *State v. Cook*, 263 N.C. 730, 140 S.E. 2d 305 (1965). "It is not necessary that a witness be an expert in order to give his opinion as to value." *State v. Cotten, supra*, at page 311. Defendant contends the language "How much does your firm pay per pound for this copper?" suggests value at the time of the trial and not at the time of the taking. The manager's testimony is in reference to the six reels of wire stolen and he states "That is in the condition it was brought in." Defendant did not introduce evidence of the wire's value. We find no merit to his argument.

[2] Defendant also argues that the court erred in charging the jury that the market value of the wire *in question* was a dollar sixty-five per pound since there was no testimony as to the market value of the particular wire alleged stolen. The manager's testimony concerning value was in reference to the "six reels of two hundred and twenty-five pound average" which were stolen and not copper wire in general. This assignment of error is overruled.

[3] As his last assignment of error, the defendant contends that the trial court erred in charging:

"For a person to be guilty of a crime it is not necessary that he, himself, do all of the action necessary to constitute the crime. If two or more persons act together with a common purpose, to commit larceny in this case, each of them is held responsible for the acts of the other done in commission of that crime."

Defendant contends that the words "to commit larceny in this case" amounted to an assertion by the trial judge that a larceny had been committed. The charge of the court must be read as a whole, and a disconnected portion may not be detached from the context of the charge and then critically examined for an interpretation from which erroneous expressions may be inferred. *State v. Bailey*, 280 N.C. 264, 185 S.E. 2d 683 (1972), *cert. denied*, 409 U.S. 948 (1972). In light of the whole charge we fail to discern any way in which defendant has been prejudiced thereby.

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No error.

Chief Judge BROCK and Judge MORRIS concur.

CITY OF CHARLOTTE, A MUNICIPAL CORPORATION v. LILLIAN FREEMAN HUDSON AND HUSBAND, E. O. HUDSON, SR.; AND T. A. FREEMAN AND WIFE, VIRGINIA S. FREEMAN

No. 7426SC722

(Filed 16 October 1974)

1. Eminent Domain § 7— instructions — omission of date of taking

In a condemnation proceeding, the trial court did not err in failing to state the date of taking in its instruction on determining market value where the date of taking was stipulated and all witnesses gave opinions as to value on such date.

2. Eminent Domain § 6— qualification of expert

In a city's action to condemn land for airport expansion, the record shows that defendants' witness was qualified to give his opinion as to the value of the condemned land and fails to show that such opinion was based in part on sales of land to the city made under threat of condemnation.

APPEAL by plaintiff from *Falls, Judge*, 29 April 1974 Session of Superior Court held in MECKLENBURG County. Heard in the Court of Appeals on 19 September 1974.

This is a proceeding wherein the plaintiff, the City of Charlotte, seeks to acquire by condemnation two parcels of land (2.84 and 11.201 acres respectively) belonging to the defendants to expand Douglas Municipal Airport. The case was tried in the superior court on the single issue as to the amount of compensation the defendants were entitled to receive for the land. The jury fixed the amount of compensation for the 2.84 acre parcel at \$25,569.00 and the 11.201 acre parcel at \$100,809.00.

From a judgment entered on the verdicts, the plaintiff appealed.

W. A. Watts for plaintiff appellant.

Thomas D. Windsor and Allen A. Bailey for defendant appellees.

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HEDRICK, Judge.

[1] By assignment of error number one the plaintiff contends the trial court erred when it "omitted the date of taking in its instruction on determining market value." We do not agree. When an entire parcel of land is to be taken by eminent domain, the proper measure of damages is the fair market value of the land at the time of the taking. G.S. 136-112(2). In the instant case, all parties entered into a stipulation that the date of taking was 17 November 1972 and all the evidence in the case indicates that there was no controversy as to the date of taking. Furthermore, all witnesses gave their opinions as to the value of the two parcels of land with respect to 17 November 1972. In our opinion, under the circumstances of this case, the trial court did not err when it failed to repeat the date of taking in its charge to the jury. Even assuming *arguendo* that it was error for the trial court not to repeat the date of taking in its charge, we do not perceive how the plaintiff could have been prejudiced thereby. "The burden is on appellant not only to show error, but that the alleged error was prejudicial and amounted to the denial of some substantial right." 1 Strong, N. C. Index 2d, Appeal and Error § 46, p. 190 (footnotes omitted). This assignment of error is not sustained.

By assignments of error two, three, four, five, and six, the plaintiff contends the court erred by making prejudicial comments, by expressing an opinion upon the weight of the evidence, by commenting on the evidence in a manner confusing to the jury, by stating that a witness was an expert when he was not tendered to the court as an expert and had not been properly qualified as an expert, and by failing to give equal stress to the plaintiff's contentions. Suffice it to say, we have carefully examined each exception upon which these assignments of error are based and find them to be without merit.

[2] By assignment of error number seven, the plaintiff challenges the opinion testimony of the defendants' witness, Thompson, as to the value of the property in question. The plaintiff asserts that this witness' testimony was incompetent because his opinion was based in part on sales of land to the city made under threat of condemnation. Before the witness was allowed to give his opinion as to the value of the land, the court, in the absence of the jury, conducted an extensive *voir dire* with respect to the basis of the witness' opinion as to values. The witness described many sales of land in the vicinity of the airport about

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the time of the taking and, on *voir dire*, told of three sales to the city. There is nothing in this record to indicate that the sales to the city were made under threat of condemnation. Moreover, it is clear from the record that the witness was thoroughly familiar with the land in question and with the value of comparable property in the vicinity at the time of the taking and that he was qualified in all respects to give his opinion as to the value of the subject property. This assignment of error is not sustained.

The plaintiff has additional assignments of error which we have carefully considered and find to be without merit.

In the trial in the superior court we find

No error.

Judges BRITT and BAILEY concur.

STATE OF NORTH CAROLINA v. JASPER LEE THOMPSON, JR.

No. 7410SC735

(Filed 16 October 1974)

Burglary and Unlawful Breakings § 5; Larceny § 7— driver of car —
guilt of breaking or entering and larceny

The State's evidence was sufficient to be submitted to the jury on issues of defendant's guilt of felonious breaking or entering and larceny where it tended to show that defendant drove four other persons to a house, waited in the car while the others broke into the house and stole property therefrom, and drove the others with the stolen property from the crime scene.

APPEAL by defendant from *McKinnon, Judge*, 29 April 1974 Session of Superior Court held in WAKE County. Heard in the Court of Appeals on 24 September 1974.

The defendant, Jasper Lee Thompson, Jr., was charged in a three-count bill of indictment, proper in form, with felonious breaking or entering, larceny, and receiving.

Upon the defendant's plea of not guilty, the State offered evidence tending to show the following:

Marion Lee Berkley, who lives at 4605 Dumfries Drive in Raleigh, left home at approximately 12:15 p.m. on 28 November

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1973. When he returned home that evening, he discovered that someone had entered the house and had taken property having a value of at least \$1,200.00. The missing property included watches, two portable radios, coins, jewelry, and personal papers.

James Watkins, who was fifteen years old, testified that he had run away from home and that he and a friend, Dennis Perry, spent the night of 27 November 1973 at the defendant's home. The next day, 28 November 1973, the defendant, Watkins, Perry, and two other boys, with defendant driving, went riding around Raleigh to "find some money." One of the boys suggested that they break into Mr. Berkley's house. The defendant drove them to Berkley's house and parked the car in the carport. All of the boys but the defendant got out of the car, went around to the back of the house, and entered the house through a sliding door. They returned to the car with some articles of personal property they had taken from the house and drove to the defendant's house, where they "took all the stuff" inside. Later that night, they put the property back into the car and drove to Fayetteville. When they arrived in Fayetteville, Watkins, Perry, and another of the boys got out of the car, taking the property with them. The defendant and the remaining boy in the group returned to Raleigh.

R. B. Tant, a detective with the Raleigh Police Department, stated that during his investigation of the break-in at the Berkley home, he talked with James Watkins. Detective Tant's testimony, relating the story that Watkins had told him, tended to corroborate Watkins' testimony at trial.

The defendant testified in his own behalf. He admitted that he was riding with the other boys on 28 November 1973 and that he drove them to Mr. Berkley's house but denied that he had any part in the break-in. He stated that he did not know Watkins personally. He thought that he was taking Dennis Perry to Perry's house so that Perry could get some clothes. He did not know Mr. Berkley. He denied that there had been any statement made about breaking into Mr. Berkley's house. He said that the boys had joked about "break[ing] into a place" but that he had said they could not do that.

The jury found the defendant guilty of felonious breaking or entering and larceny. On the count of felonious breaking or entering, the trial court sentenced the defendant to a prison term

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of one (1) year. On the count of felonious larceny, the trial court sentenced the defendant to a prison term of three (3) years, sentence suspended, and placed the defendant on probation for five (5) years. Defendant appealed.

James H. Carson, Jr., Attorney General, by Assistant Attorney General Keith L. Jarvis for the State.

Carl E. Gaddy, Jr., for defendant appellant.

HEDRICK, Judge.

Defendant contends the court erred in denying his timely motions for judgment as of nonsuit. Suffice it to say, there is plenary competent evidence in the record to require submission of this case to the jury and to support the verdicts.

All of the other exceptions brought forward and argued in defendant's brief relate to the court's instructions to the jury. We have carefully examined the entire charge in the light of all the defendant's exceptions and conclude that the charge given by the able judge was fair, adequate, and correct. Any elaboration on these contentions would serve no useful purpose. The defendant had a fair trial free from prejudicial error.

No error.

Judges MORRIS and BAILEY concur.

STATE OF NORTH CAROLINA v. RONALD GREGORY WILSON

No. 7415SC720

(Filed 16 October 1974)

1. Larceny § 7— larceny of automobile — sufficiency of evidence

In a prosecution for larceny of an automobile, evidence was sufficient to be submitted to the jury where it tended to show that the vehicle in question was parked in a service station lot, a service station attendant saw the car leave the lot, neither the owner nor the attendant gave anyone permission to drive the car, an officer shortly thereafter apprehended defendant as he was driving the vehicle, and defendant could produce no vehicle registration card.

2. Larceny § 1— felonious intent defined

Felonious intent, as applied to the crime of larceny, is the intent which exists where a person knowingly takes and carries away the

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personal property of another without any claim or pretense of right with the intent wholly and permanently to deprive the owner of his property and to convert it to the use of the taker or to some other person than the owner; the trial court's instruction on felonious intent was proper in this case.

APPEAL by defendant from *Clark, Judge*, 25 February 1974 Session of Superior Court held in ORANGE County. Heard in the Court of Appeals on 18 September 1974.

This is a criminal prosecution brought on a bill of indictment, proper in form, charging the defendant, Ronald Gregory Wilson, with the larceny of a 1973 automobile valued at \$4,800. From a verdict of guilty and a judgment imposing a prison sentence of not less than four but not more than six years, the defendant appealed.

James H. Carson, Jr., Attorney General, by Associate Attorney Charles J. Murray for the State.

Haywood, Denny & Miller by Emery B. Denny, Jr., and William N. Farrell, Jr., for the defendant appellant.

HEDRICK, Judge.

[1] The first question for resolution on this appeal is whether the trial court erred in denying the defendant's motions for judgment as of nonsuit.

The State's evidence tended to show the following: Jackie Diane Snipes was the owner of a 1973 green and tan Cutlass automobile on 11 October 1973. Jackie Snipes lives in Chapel Hill and works for the University of North Carolina. On the morning of 11 October 1973 her boyfriend, Mel Baker, drove her to work and took her car to Baker's 66 Service Station on West Franklin Street in Chapel Hill, where he worked, for servicing. Jackie Snipes did not know the defendant and did not give him permission to drive her car on that day. She did not give Mel Baker permission to let anyone drive her car.

Mel Baker testified that he parked the car in the service station lot. He testified that he saw the Snipes car leave the lot at approximately 11:25 a.m. It was headed east on Franklin Street towards Durham. He further testified that he did not know the defendant and had not given anyone permission to borrow the car.

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Officer C. E. Baldwin of the Durham Police Department testified that at about 11:25 a.m. on 11 October 1973 he received a report to be on the lookout for a green and tan Cutlass headed toward Durham from Chapel Hill which had allegedly been stolen. About ten or fifteen minutes later, Officer Baldwin saw a car fitting this description headed north on I-85. He gave a pursuit and stopped the vehicle. Officer Baldwin testified that the defendant was driving the automobile and that the defendant was unable to produce a registration card for the car. Upon checking the license number of the automobile through the Department of Motor Vehicles, Officer Baldwin discovered that the car belonged to Jackie Diane Snipes. Baldwin further testified that the defendant denied he had stolen the car and that the defendant stated he had borrowed the car from a friend so that he could go to Durham to renew his driver's license.

The defendant contends that the State failed to introduce sufficient evidence to establish that the defendant intended to permanently deprive Jackie Diane Snipes of her automobile. He contends that the exculpatory statements of the defendant introduced by the State are not contradicted by other facts and circumstances and that they negate the existence of a "felonious intent" on the part of the defendant.

It is well established that "[w]here some of the evidence introduced by the State tends to inculcate a defendant and other portions of it tend to exculpate him, the incriminating evidence requires submission of the case to the jury, and the State is not precluded from showing the facts to be other than as stated in a declaration of the defendant as related by one of its witnesses." *State v. McCuien*, 15 N.C. App. 296, 302, 190 S.E. 2d 386, 390 (1972), cert. denied, 282 N.C. 154, 191 S.E. 2d 603 (1972) (citations omitted). In this case the record is replete with evidence which, when viewed in the light most favorable to the State, tends to incriminate the defendant. This assignment of error is overruled.

[2] The defendant also contends that the trial court erred to his prejudice in refusing to instruct the jury as requested with respect to "felonious intent." "Felonious intent," as applied to the crime of larceny, "is the intent which exists where a person knowingly takes and carries away the personal property of another without any claim or pretense of right with the intent wholly and permanently to deprive the owner of his property and to convert it to the use of the taker or to some other person

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than the owner. * * * And, what is meant by 'felonious intent' is a matter for the court to explain to the jury and no exact words are required to instruct the jury as to its meaning." *State v. Wesson*, 16 N.C. App. 683, 687, 193 S.E. 2d 425, 428 (1972) (citations omitted).

We have carefully reviewed the charge to the jury and are of the opinion that the trial court correctly declared and explained the law with respect to "felonious intent" and correctly applied the evidence to this element of the offense charged. The defendant was afforded a fair trial free from prejudicial error.

No error.

Judges BRITT and BALEY concur.

STATE OF NORTH CAROLINA v. JAMES A. STONE, JR.

No. 7411SC632

(Filed 16 October 1974)

Criminal Law § 145.1— revocation of probation

The evidence supported findings by the court that defendant violated conditions of his probation by violating his curfew, by taking an overdose of drugs contrary to the condition that he avoid injurious or vicious habits, and by being in arrears in payment of a fine and court costs.

APPEAL by defendant from *Hobgood, Judge*, 25 March 1974 Session, LEE County Superior Court. Heard in the Court of Appeals 23 September 1974.

At the 28 July 1972 Session of the Superior Court of Lee County, the defendant entered a plea of guilty to the crime of nonfelonious breaking and entering and nonfelonious larceny (two counts). He was sentenced to a term of two years, which sentence was suspended, and the defendant was placed on probation for a period of three years subject to certain conditions of probation as set out in the probation judgment including the following conditions:

1. "Not to be on the streets or any public place after the hours of 12:30 a.m. any night during his term of probation."

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2. "Pay a fine of \$250 and Cost in the amt. of \$120 at a rate of \$35 per month, with the first payment coming due on the last day of August. \$35 payments will follow on the last day of each month until Cost and Fine are paid in full."

3. "Avoid injurious or vicious habits."

On 28 January 1974, defendant's probation officer served a bill of particulars on him charging him with violation of the conditions of his probation in three particulars: (1) He violated the curfew by being found in the hospital in Rockingham, North Carolina, at 1:30 a.m. on 21 January 1974. (2) He was believed to have taken an overdose of drugs on 20 January, 1974, which was a violation of the condition that he avoid injurious or vicious habits. (3) He had not kept up his payments on his fine and court costs and was \$100 in arrears. A hearing was held on 4 February 1974, and then was continued until 26 March 1974, at which time the hearing was completed. On the morning of 26 March 1974, the defendant paid the entire balance due on his fine and court costs in the amount of \$142.00.

Judge Hobgood found that the defendant wilfully and without lawful excuse, being able-bodied and with financial ability to comply, had violated the terms and conditions of the probation judgment with respect to all three of the conditions reported by the probation officer. Thereupon, Judge Hobgood placed the suspended sentence into effect, and the defendant appealed.

Attorney General James H. Carson, Jr., by Assistant Attorney General Eugene A. Smith for the State.

O. Tracy Parks III for defendant appellant.

CAMPBELL, Judge.

The defendant asserts that there was insufficient evidence to support the findings of fact made by the judge and that the judge abused his discretion and that the judgment was arbitrary.

As stated by Parker, Chief Justice, for the Court, in *State v. Hewett*, 270 N.C. 348, 353, 154 S.E. 2d 476, 479-80 (1967):

"A proceeding to revoke probation is not a criminal prosecution, and we have no statute in this State requiring a formal trial in such a proceeding. Proceedings to revoke probation are often regarded as informal or summary. The

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courts of this State recognize the principle that a defendant on probation or a defendant under a suspended sentence, before any sentence of imprisonment is put into effect and activated, shall be given notice in writing of the hearing in apt time and an opportunity to be heard. . . . Upon a hearing of this character, the court is not bound by strict rules of evidence, and the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt."

We have reviewed the record in this case and are of the opinion that the evidence heard and considered by Judge Hobgood are sufficient to support his findings and conclusion and that there was no abuse of his discretion or any arbitrary conduct on his part. On the contrary, the record discloses that the court and probation officers endeavored to rehabilitate the defendant and that the suspended sentence was placed into effect only after all other efforts had failed.

Affirmed.

Judges BRITT and VAUGHN concur.

JAMES ROLAND WILLIAMS, EMPLOYEE-PLAINTIFF v. SALEM YARNS,
DIVISION OF CHESTERFIELD YARN MILLS, EMPLOYER-DEFENDANT,
AND THE HOME INDEMNITY COMPANY, CARRIER-DEFENDANT

No. 7420IC560

(Filed 16 October 1974)

1. Master and Servant § 59— workmen's compensation — assault as accident within meaning of Act

An assault, although an intentional act, may be an accident within the meaning of the Compensation Act, when it is unexpected and without design on the part of the employee who suffers from it; however, to be compensable, the assault must have had such a connection with the employment that it can be logically found that the nature of the employment created the risk of the attack.

2. Master and Servant § 59— workmen's compensation — shooting of employee by third person — injury not compensable

Findings of fact by the deputy commissioner in a workmen's compensation hearing were insufficient to support the conclusion that plaintiff's injury resulted from an accident arising out of his employment where the evidence tended to show that plaintiff was leaving his

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employer's mill with two other employees when he was struck by buckshot from a shotgun fired by a homeowner whose home was across the road from the mill and with whom plaintiff was not acquainted.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission entered on 20 February 1974 in Docket E-8311.

Proceedings under the Workmen's Compensation Act. At the hearing before the Deputy Commissioner, plaintiff's evidence showed: Plaintiff, a first-shift employee, left his employer's mill shortly after completion of his shift at 3:00 p.m. and started walking with two other employees toward the mill parking lot. Before reaching the lot, he was struck by buckshot from a shotgun fired by one Carson Cheek, whose home was across the road and about 250 feet from the mill. Plaintiff was not acquainted with Cheek but knew his name and had spoken in passing. Shortly before the shot, two employees, Carolyn Yow and Sharon Best, had arrived at the parking lot preparatory to going to work on the second shift. Neither of these employees knew Cheek. As Sharon was parking her car, Cheek, standing on his lot across the road, commenced to shout and motion parking instructions to her, using profanity in the process. While Carolyn and Sharon were walking from the parking lot toward the mill, Cheek shouted: "You all ain't nothing but damn sons-of-bitches, every one of you damn sons-of-bitches," and "I'll get you all." At this time no other employees were on the parking lot, and Carolyn and Sharon proceeded into the mill without further incident.

Cheek, called as a witness for defendants, testified that he did not know plaintiff or Carolyn or Sharon that he had been drinking and did not recall helping Sharon park, nor did he recall shouting in the direction of the mill. He testified he had never had a conversation with Sharon or Carolyn, and he stated that he fired the shotgun at a stray dog which was fighting his dog. He admitted he had pled guilty to an assault in connection with the shooting and that he had been placed on probation and ordered to pay \$1,000.00 to plaintiff. He also testified that he had never been employed at the mill, had never applied for a job there, and did not know a lot of the employees.

The Deputy Commissioner found and concluded that plaintiff sustained an injury by accident arising out of and in the course of his employment and awarded compensation. On appeal,

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the Full Commission affirmed and adopted the opinion and award of the Deputy Commissioner as its own.

Boyette & Boyette by M. G. Boyette for plaintiff appellee.

Hedrick, McKnight, Parham, Helms, Kellam & Feerick for defendant appellants.

PARKER, Judge.

With respect to time, place, and circumstances, plaintiff's injuries were sustained in the course of his employment. *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E. 2d 47 (1968). The question presented is whether they also resulted from an accident arising out of his employment. We hold they did not.

[1, 2] An assault, although an intentional act, may be an accident within the meaning of the Compensation Act, when it is unexpected and without design on the part of the employee who suffers from it. *Withers v. Black*, 230 N.C. 428, 53 S.E. 2d 668 (1949). To be compensable, however, the assault must have had such a connection with the employment that it can be logically found that the nature of the employment created the risk of the attack. *Robbins v. Nicholson*, 281 N.C. 234, 188 S.E. 2d 350 (1972). No such connection has been shown by the evidence in the present case.

The Deputy Commissioner did make the following findings of fact which, if supported by any evidence, might serve to show some slight connection between the assault and plaintiff's employment in this case.

"He [Cheek] had a 12-gauge shotgun loaded with buckshot No. 6 in his hands when he made the shouting statement [heard by Carolyn and Sharon while they were at the parking lot]. Several other second shift employees were in the parking lot at this time."

Had this finding been supported by evidence it might be inferred that Cheek held such animus toward all employees at the mill that an assault upon one of them might be considered as arising out of his employment. The evidence, however, not only does not support the above quoted finding but directly contradicts it. The only witnesses who testified concerning these events were Carolyn, Sharon and Cheek. Carolyn testified:

"I didn't see any type of weapon that Mr. Cheek had. . . ."

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"I guess he was shouting to everybody, me and Sharon, both of us were out there. There was no one else out there that I know of. They come up and they went in the mill. We were the only two standing out there and he was shouting at us.

* * * * *

"I don't know of my own knowledge whether or not that language was directed to me or to Sharon or to anyone else."

Sharon testified:

"They were a few girls that went in before we did. They weren't anybody out there whenever that happened. No other employees were coming out at that time."

Cheek denied making the threatening statements at all.

When the Deputy Commissioner's factual findings which are not supported by any evidence are eliminated, the remaining factual findings furnish no basis from which it may be logically inferred that the assault in this case had any connection with plaintiff's employment.

The award of the Industrial Commission is

Reversed.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. CYNTHIA GAYE ARNEY

No. 7325SC720

(Filed 16 October 1974)

1. Criminal Law § 92— consolidation of cases against two defendants

The trial court did not abuse its discretion in consolidating defendant's case with that of another person charged with the same crime where the events which gave rise to the two cases were so connected in time, place and circumstances as to make one continuous criminal episode.

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2. Receiving Stolen Goods § 5— receiving stolen credit cards — sufficiency of evidence

In a prosecution for feloniously receiving credit cards with knowledge that they had been taken without the cardholder's consent and with intent to use them, evidence was sufficient to be submitted to the jury where it tended to show that defendant asked a friend to go through the cars in a hotel parking lot to find some money for her, the friend found the credit cards in question and gave them to defendant, on that same day defendant was arrested and searched, and the credit cards were found on her person. G.S. 14-113.9(a) (1).

3. Criminal Law § 76; Constitutional Law § 31— confession of testifying codefendant — admission not prejudicial to defendant

Defendant was not prejudiced by the admission of portions of an extrajudicial confession of a codefendant which inculpated defendant where defendant failed to make objection to the confession; moreover, the codefendant testified at trial so that defendant was accorded her right of confrontation.

4. Criminal Law § 112— circumstantial evidence — instruction not required

Where the charge is correct as to burden and measure of proof, then, in absence of a specific request to instruct the jury as to how they should regard circumstantial evidence, the failure of the trial judge to give such an instruction will not be held to be reversible error.

APPEAL by defendant from *Winner, Judge*, 16 April 1973 Session of Superior Court held in BURKE County.

By bill of indictment proper in form defendant was charged with feloniously receiving credit cards with knowledge that they had been taken without the cardholder's consent and with intent to use them, a violation of G.S. 14-113.9(a) (1). By separate indictment, one Marcus Chris McElveen was charged with theft of the same credit cards. Over defendant's objection the two cases were consolidated for trial. Defendant pled not guilty, was found guilty as charged, and from judgment imposing a prison sentence, appealed.

Attorney General Robert Morgan by Assistant Attorney General William F. Briley for the State.

Simpson, Martin & Baker by Gene Baker for defendant appellant.

PARKER, Judge.

[1] Defendant assigns error to the consolidation for trial of her case with the case against McElveen. The question whether to consolidate was for the sound discretion of the trial judge.

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State v. Wright, 270 N.C. 158, 153 S.E. 2d 883 (1967). Here, the record discloses that the events which gave rise to the two cases were so connected in time, place and circumstances as to make one continuous criminal episode. Under such circumstances consolidation was proper, *State v. Walker*, 6 N.C. App. 447, 170 S.E. 2d 627 (1969), and no abuse of the trial judge's discretion has been shown.

[2] Defendant next assigns error to the denial of her motions for nonsuit. In summary, the State's evidence showed that at about 9:00 a.m. on 23 January 1973 one McGinnis, to whom the credit cards had been issued, parked his car in the old Caldwell Hotel parking lot. The car was not locked and the credit cards were in a billfold in the glove compartment. McGinnis did not know defendant or McElveen and had given no one permission to go into his car or to take his credit cards. On that date defendant was an escapee from the Sheriff's Department, which had picked her up for violation of probation. She needed money and asked her friend, McElveen, to go through the cars at the parking lot and try to get her some money. McElveen did so and found the credit cards in the McGinnis car. He gave the cards to defendant and told her that they were not money but that she could use them later on. On the night of 23 January 1973 defendant was arrested. She was highly intoxicated and was taken to jail. There she was searched, and the credit cards were found on her person. This evidence, considered in the light most favorable to the State, furnished substantial evidence of every essential element of the offense with which defendant was charged, and her motions for nonsuit were properly denied.

[3] The fact that essential portions of the State's evidence was supplied by the extrajudicial confession of McElveen, which inculpated defendant, is immaterial. Although such portions of McElveen's confession as tended to incriminate defendant should have been excluded had timely objection been made, *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968), no such objection was made. Moreover, in this case, the codefendant, McElveen, testified at the trial, so that defendant was accorded her right of confrontation.

[4] Finally, defendant contends that the trial judge erred in failing to charge the jury as to "circumstantial evidence as applied to the facts." In this connection defendant contends that although there was direct evidence that defendant received the cards and that she still had them in her possession a few hours

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later, the evidence that she knew they had been stolen and that she intended to use them unlawfully was altogether circumstantial. From this, defendant argues that she was entitled to have the jury instructed as to how they should view circumstantial evidence. It is true, of course, that a person's knowledge and intent concerning some particular matter must frequently be arrived at by inference from proof of other facts, and in that sense the evidence to show knowledge and intent in the present case may be considered to be circumstantial. Where, however, the proof of the other fact is so direct and the inference to be drawn is so compelling as it is in the present case, a separate instruction as to how circumstantial evidence should be viewed seems hardly appropriate. The judge here did clearly and explicitly instruct the jury that in order to find defendant guilty they were required to find from the evidence beyond a reasonable doubt both that she knew that the cards had been stolen and that she intended to use them unlawfully. Where the charge is correct as to burden and measure of proof, then, in absence of a specific request to instruct the jury as to how they should regard circumstantial evidence, the failure of the trial judge to give such an instruction will not be held to be reversible error. *State v. Warren*, 228 N.C. 22, 44 S.E. 2d 207 (1947). Here, the record fails to indicate clearly that any request for special instructions was submitted at the time and in the manner required by G.S. 1-181.

In defendant's trial and in the judgment rendered we find

No error.

Judges MORRIS and VAUGHN concur.

THOMAS L. WOOD v. CARMIE ESLEY WOOD AND HIS WIFE,
ESTHER WOOD

No. 7420SC467

(Filed 16 October 1974)

1. Executors and Administrators § 6— death of property owner — vesting of title

Upon the death of a person intestate, title to the decedent's personal property vests in his personal representative and title to his lands vests in his heirs, subject to being sold only if the personalty

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is insufficient to pay the debts of the estate, and the lands are not assets of the estate until sold and the proceeds received by the administrator.

2. Cancellation of Instruments § 7— attack on conveyance on ground of fraud — party who may bring action

The right to attack a conveyance on the ground of fraud or undue influence rests solely in the grantor, or, upon his death intestate, in his heirs, or, upon his death testate, in his devisees, or, if the property is personalty, in his personal representative; if the personal representative is required to sell land to make assets, the personal representative rather than the heirs or devisees may bring the action.

3. Cancellation of Instruments § 7; Executors and Administrators § 6— attack on conveyance on ground of fraud — right of administratrix to maintain action

In an action originally brought by grantor to have a deed set aside on the ground of fraud where the grantor died and the administratrix requested that she be substituted as plaintiff, the cause is remanded for further findings and a determination as to whether the administratrix is required to sell the real property in question to pay the obligations of the estate, since such finding will determine who has the right to bring this action to set aside the deceased grantor's conveyance.

SADIE Shelton, administratrix of the estate of Thomas L. Wood, appeals from an order of *Seay, Judge*, 21 January 1974, Session of MOORE County Superior Court.

This action was originally brought by Thomas L. Wood on 5 June 1967 to have a certain deed made by Thomas L. Wood set aside, alleging fraud in its procurement by defendants. The record shows Thomas L. Wood died 11 March 1969, and Sadie Shelton was appointed administratrix on 26 August 1969. The trial court, upon being informed that plaintiff had died, dismissed the action 2 September 1970. On 10 September 1973, the administratrix moved to set aside the order of 2 September 1970 pursuant to G.S. 1A-1, Rule 60(b) (4) and requested that she be substituted as plaintiff pursuant to G.S. 1A-1, Rule 25(a). Administratrix also requested leave to file a supplemental complaint pursuant to G.S. 1A-1, Rule 15(d). The trial court denied the motions of the administratrix.

William D. Sabiston, Jr. and Hurley E. Thompson, Jr., for movant appellant.

Seawell, Pollock, Fullenwider, Van Camp & Robbins, by James R. Van Camp and Cynthia Jean Zeliff, for defendant appellee.

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MARTIN, Judge.

Administratrix contends that the order of 2 September 1970 was a nullity in that it failed to comply with the requirements of G.S. 1A-1, Rule 25 and, therefore, the motion of administratrix to obtain relief from a void judgment pursuant to G.S. 1A-1, Rule 60(b)(4) should have been allowed. Defendant argues that a motion to relieve a party on the basis that the judgment is void must be brought within a reasonable time. Apparently, federal cases conflict with defendant's argument. "By the same token, there is no time limit on an attack on a judgment as void. The one-year limit applicable to some Rule 60(b) motions is expressly inapplicable, and even the requirement that the motion be made within a 'reasonable time', which seems literally to apply to motions under Rule 60(b)(4), cannot be enforced with regard to this class of motion." 11 Wright and Miller, Federal Practice and Procedure, § 2862, p. 197 (1973). We do not decide this issue, nor do we decide the issue of whether the order of 2 September 1970 was void or merely irregular.

At the threshold of our consideration of this case, we are confronted with the question of law whether the administratrix is the real party in interest to bring this action. It is fundamental that the real party in interest must prosecute a claim. G.S. 1A-1, Rule 17(a); G.S. 1-57. In *Kelly v. Kelly*, 241 N.C. 146, 151, 84 S.E. 2d 809 (1959), the court states:

"We now consider the plaintiff's demurrer to the further answer and defense of John Kelly and wife, in which they allege the plaintiff's deed is invalid by reason of the mental and physical condition of Sam Kelly, Jr., at the time the deed is purported to have been executed, and that it was obtained by the plaintiff through undue and improper influence and duress upon the said Sam Kelly, Jr. In our opinion, these defendants are without legal authority to assert such an attack. This right is vested exclusively in the heirs of Sam Kelly, Jr. (Sam Kelly, Jr. having died since the execution of said deed and, according to plaintiff's brief, these defendants are not his heirs), unless the personal representative of Sam Kelly, Jr., deceased, is required to sell real estate in order to create assets to pay the obligations of his estate. In this event, his personal representative would have the right to bring such an action."

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[1, 2] "Upon the death of a person intestate, title to the decedent's personal property vests in his personal representative and title to his lands vests in his heirs, subject to being sold only if the personalty is insufficient to pay the debts of the estate, and the lands are not assets of the estate until sold and the proceeds received by the administrator." 3 Strong, N. C. Index 2d, Executors and Administrators, § 6, p. 721, and cases cited therein. See also *Paschal v. Autry*, 256 N.C. 166, 123 S.E. 2d 569 (1962). "The right to attack a conveyance on the ground of fraud or undue influence rests solely in the grantor, or, upon his death intestate, in his heirs, or, upon his death testate, in his devisees, or, if the property is personalty, in his personal representative. . . . If the personal representative is required to sell land to make assets, the personal representative rather than the heirs or devisees may bring the action." 2 Strong, N. C. Index 2d, Cancellation of Instruments, § 7, p. 68-69, and cases cited therein.

[3] The foregoing rules apply to determine who has a right to bring an action to set aside the decedent's conveyance. In the case at bar, the record does not show whether the administratrix is required to sell the real property in question in order to create assets to pay the obligations of the estate. If such were the case, then it would appear that the heirs of Thomas L. Wood, if any, would be necessary parties to this action. G.S. 1A-1, Rule 19(a) and (b). See also *Paschal v. Autry*, *supra*; *Wall v. Sneed*, 13 N.C. App. 719, 187 S.E. 2d 454 (1972).

Without expressing any opinion as to the merits of this action, the order of Judge Seay on 24 January 1974 is vacated and remanded for further findings of fact and action as the law directs.

Judgment vacated and cause remanded.

Chief Judge BROCK and Judge MORRIS concur.

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DANNY LEE OLIVER v. ROBERT EUGENE BEASLEY

No. 7411SC600

(Filed 16 October 1974)

Automobiles § 83— pedestrian in marked crosswalk — no contributory negligence as a matter of law

In an action by a pedestrian to recover for personal injuries allegedly caused by defendant's negligent operation of a motor vehicle the trial court erred in granting defendant's motion for judgment n.o.v. based on plaintiff's contributory negligence where the evidence tended to show that plaintiff was in a marked crosswalk at an intersection with the traffic signal in his favor; when he stepped off the curb, he looked to the left and the intersection was clear; he failed to look again until he was struck by defendant who had run a stoplight.

APPEAL by plaintiff from *Peel, Judge*, 4 March 1974 Civil Session of Superior Court held in JOHNSTON County.

This is a civil action in which plaintiff, a pedestrian, seeks damages for personal injuries, medical expenses, and loss of earnings allegedly caused by the defendant's negligent operation of a motor vehicle.

Issues of negligence, contributory negligence, and damages were submitted to and answered by the jury in favor of plaintiff. The issue as to damages was answered in the amount of \$5,000. After the verdict was returned by the jury, defendant moved for judgment n.o.v. on the ground that the evidence failed to establish actionable negligence on the part of defendant and established contributory negligence on the part of plaintiff as a matter of law. The motion was allowed on the ground of plaintiff's contributory negligence and from judgment dismissing the action, plaintiff appealed.

Mast, Tew & Nall, P.A., by Joseph T. Nall, for the plaintiff appellant.

Robert A. Spence, P.A., by Robert A. Spence, for the defendant appellee.

BRITT, Judge.

The only question presented for review is whether plaintiff's evidence established his contributory negligence as a matter of law. We hold that it did not.

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Plaintiff's evidence tended to show: Market Street, which is also a part of U.S. 70, in Smithfield, N. C., runs in an east-west direction, and is bisected by Third Street which runs in a north-south direction. On 19 December 1970, Market Street had four lanes for vehicular traffic, each lane being 10 feet wide; two lanes were used for eastbound traffic and two for westbound traffic. On each side of Market Street there were paved sidewalks, 13 feet wide, and between them and the traffic lanes were parking lanes 7 feet wide. Third Street was approximately 49 feet wide with sidewalks approximately 11.5 feet wide on each side. Traffic at the intersection of Market and Third Streets was controlled by electric signals installed pursuant to appropriate ordinance of the Town of Smithfield.

At around 11:30 a.m. on said date, plaintiff and a companion were walking south on the sidewalk on the west side of Third Street. On reaching Market Street, plaintiff looked at the traffic light and saw that it was green for traffic on Third Street and was red for traffic on Market Street; he also saw that "the intersection was clear." The intersection was to plaintiff's left and he looked to his left before attempting to cross Market Street. As plaintiff entered the second lane for westbound traffic on Market Street, defendant's pickup truck, which was proceeding west, struck him. Other traffic on Market Street was stopped at the time of the accident and plaintiff was in the marked crosswalk when he was struck. On cross-examination, plaintiff stated:

" . . . After I checked the lights I proceeded on out into the street. The lights was green for me and red for traffic on 70 or Market Street. The middle of that intersection was clear. I just glanced up at the lights and the lights indicated for me to go and the intersection was clear. I don't know about the traffic to the east. I looked east to see the light, that is all. I did not look east to see if any traffic was coming.

"As I reached the beginning of the second lane of traffic immediately before I was struck, I did not look east to see if any traffic was coming. When I crossed the street I looked straight in front of me across that street. At this particular time I never looked in the direction from which traffic would be coming to see if any traffic was coming at all from the time I walked from the curbing, seven feet across the

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parking area and ten feet across the first lane of traffic. I don't remember whether I was walking fast or slow. . . ."

While the facts in *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47 (1969), were somewhat different from those in the case at bar, we think the principle of law applied in that case is applicable here. In *Bowen*, the plaintiff was crossing a street in the nighttime at an intersection where traffic was not controlled by electric signals. She was struck by a motorcycle traveling on the bisecting street. We quote from the opinion (pp. 368-9) :

" . . . Hence, it was error to conclude that she was contributorily negligent as a matter of law for failure to see the motorcycle and to use ordinary care for her own safety.

If she was crossing in an unmarked crosswalk at an intersection, she was not required to anticipate negligence on the part of others. In the absence of anything which gave or should have given notice to the contrary, she was entitled to assume and to act upon the assumption, even to the last moment, that others would observe and obey the statute which required them to yield the right of way. . . . Had plaintiff seen the motorcycle approaching, this rule of law would still apply. Whether its speed, proximity, or manner of operation were such that plaintiff, simply by failing to see it, failed to exercise due care for her own safety is a jury question on this record. The evidence shows nothing unusual in the motorcycle's approach which would have put plaintiff on notice that the cyclist did not intend to obey the law and yield the right of way. Thus the circumstances permit opposing inferences, and this carries the case to the jury." (Emphasis added.)

Accord: *Currin v. Williams*, 248 N.C. 32, 102 S.E. 2d 455 (1958) ; *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E. 2d 151 (1969) ; *Blashfield Automobile Law and Practice*, sec. 142.51, pp. 97-8 (3d ed. 1965).

In the case at bar, the evidence tended to show that plaintiff was in a marked crosswalk at an intersection with the traffic signal in his favor; when he stepped off the curb, he looked to the left and the intersection was clear; he failed to look again until he was struck by defendant who had run a stoplight. Plaintiff could assume that motorists on Market Street would

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observe and obey the traffic signal requiring them to yield the right-of-way.

In our opinion, the evidence presented a question for jury determination and the jury made that determination in favor of plaintiff. The trial court erred in allowing defendant's motion for judgment n.o.v. and the judgment dismissing the action is vacated. This cause is remanded to the superior court for entry of judgment predicated on the verdict returned by the jury.

Judgment vacated and cause remanded.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. DOUGLAS McALLISTER

No. 7414SC661

(Filed 16 October 1974)

1. Forgery § 2— full check set out in indictment — sufficiency to charge crime

In a prosecution for forgery of two checks where the State contended that the entire checks were forgeries, bills of indictment were not insufficient where they set out the full wording of the checks and endorsements but did not specify the words on the checks which the State contended were forged.

2. Forgery § 2— failure to allege person to whom forged check uttered — sufficiency of indictment

Indictments charging defendant with forging checks and uttering forged checks alleged "an intent to defraud" and thereby met the requirements of G.S. 15-151, though the indictments did not allege to whom the checks were uttered.

APPEAL by defendant from *Brewer, Judge*, 8 April 1974 Session of Superior Court held in DURHAM County.

In a bill of indictment returned in #73CR18903, defendant was charged with (1) forgery of a check in amount of \$249.60, and (2) uttering said check. In a bill of indictment returned in #73CR18904, he was charged with (1) forgery of a check in amount of \$350 and (2) uttering said check. The indictments charged that the offenses in both cases occurred on 6 September 1973, that the checks were drawn on Union National Bank,

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Creedmoor, N. C., were payable to the order of Mr. James D. Jones, and were signed "Robert Blake."

Defendant pleaded not guilty, a jury found him guilty as charged, and from judgments imposing prison sentences, he appealed.

Attorney General James H. Carson, Jr., by Assistant Attorney General Walter E. Ricks III and Associate Attorney Diederich Heidgerd, for the State.

Loflin, Anderson & Loflin, by Thomas F. Loflin III, for the defendant appellant.

BRITT, Judge.

[1] By one of his assignments of error, defendant challenges the sufficiency of the bills of indictment. He contends that while the indictments set out the full wording of the checks and endorsements, they do not specify the words on the checks which the State contends were forged. Defendant relies principally on the following cases: *State v. Coleman*, 253 N.C. 799, 117 S.E. 2d 742 (1961); *State v. Moffitt*, 9 N.C. App. 694, 177 S.E. 2d 324 (1970), cert. denied 281 N.C. 626, 190 S.E. 2d 472 (1972); *State v. Cross*, 5 N.C. App. 217, 167 S.E. 2d 868 (1969). We think the cited cases are distinguishable from the cases at bar.

In *Coleman*, we find the following language (p. 801): ". . . [E]ven though the offense of forgery is charged in statutory language . . . the statutory words must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged. (Citations.)" The record in *Coleman* discloses that defendant in that case was placed on trial for forging an endorsement on a check; the bill of indictment which the Supreme Court held was insufficient, charged forgery and uttering in statutory language, and set out the full wording of the check, but did not set out *any* wording with respect to the endorsement.

In *Moffitt*, we find the following language (p. 696): "Furthermore, it appears that the former bill returned in the case at bar was fatally defective in that it failed to aver the words alleged to have been forged by defendant. (Citations, including *Coleman*.)" Defendant argues that the quoted language requires

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more than setting out the words and figures of a check in a bill of indictment charging forgery or uttering; that the indictment must pinpoint the particular words or figures which the State contends were forged. We reject this argument as being applicable to all cases. The "former bill" referred to in *Moffitt* did not set out the wording of the instrument alleged to have been forged and uttered, nor did it contain a photostatic copy or other reproduction of the instrument.

While the holding in *Cross* comes closer to defendant's contention, we think the cases are distinguishable. In *Cross*, defendant was charged with forging and altering an American Express money order. A photostatic copy of the money order was attached to, and, by reference, made a part of, the indictment. The wrongful act complained of was the raising of the amount of the money order from \$1.00 to \$100. The court held that the indictment was insufficient in that it did not aver the manner in which the money order was altered or defaced. In the instant case, the State contends the *entire* checks were forgeries.

[2] Defendant contends that the uttering counts in the indictments were insufficient for the reason that they did not allege to whom the checks were uttered. We think this question is controlled by G.S. 15-151, which states: "In any case where an intent to defraud is required to constitute the offense of forgery, or any other offense whatever, it is sufficient to allege in the indictment an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded;" The challenged indictments alleged "an intent to defraud."

On the facts appearing in this case, we hold that the indictments were not fatally defective and the assignment of error is overruled.

Defendant has brought forward and argued numerous other assignments of error. Suffice it to say, we have carefully considered each of them and find them also to be without merit.

No error.

Judges CAMPBELL and VAUGHN concur.

Setzer v. Dunlap

FELICIA SETZER v. GLORIA L. DUNLAP

No. 7418DC717

(Filed 16 October 1974)

1. Rules of Civil Procedure § 59— inadequate damages — new trial — discretionary matter

A judge may grant a new trial to any party on the grounds that inadequate damages were awarded which appear to have been given under the influence of passion or prejudice, and a motion in this regard is directed to the sound discretion of the trial judge.

2. Rules of Civil Procedure § 59— inadequate damages — new trial — no abuse of discretion

The trial court in a personal injury action did not abuse its discretion in granting plaintiff's motion for a new trial based on the inadequacy of damages of \$126 determined by the jury.

APPEAL by defendant from *Washington, Judge*, 3 March 1974 Session of the General Court of Justice of GUILFORD County, District Court Division. This case was submitted to the Court of Appeals on 19 September 1974, pursuant to North Carolina Court of Appeals Rule 10.

Plaintiff filed a complaint on 17 January 1974, asserting that as the result of the defendant's negligence in the operation of her car on 3 August 1973 while she was a passenger therein, she suffered personal injuries. She claimed damages of \$2,240.65 of which \$126.25 was for medical bills and \$114.40 was for lost wages.

The plaintiff's evidence established that she was riding in the defendant's car; that the defendant's car was following another car; that the car in front swerved to miss a third car in the same lane; that the defendant's car collided with the rear end of the third car; that the collision caused personal injury to the plaintiff; that the plaintiff's medical bills amounted to \$126.25 and that the plaintiff was out of work for fifty-two hours which, at her hourly wage of \$2.20, amounted to \$114.40 in lost wages. The plaintiff also put on evidence as to her continued pain and suffering.

After the plaintiff rested, the case was submitted to the jury as the defendant put on no evidence. The issues were presented and answered by the jury as follows:

"(1) Was the plaintiff injured as a result of the negligence of the defendant as alleged in the plaintiff's complaint?"

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ANSWER: Yes.

- (2) What amount, if any, is the plaintiff entitled to recover of the defendant?

ANSWER: \$126.00."

After the return of the verdict, plaintiff moved pursuant to G.S. 1A-1, Rule 59(a) (6) and (7) that the court set aside the verdict as the damages were inadequate and that the court grant a new trial. This motion was granted by judgment filed 6 March 1974.

The defendant excepts and appeals.

Clontz, Gardner and Tate by James W. Clontz for the plaintiff appellee.

Sapp and Sapp by W. Samuel Shaffer II for the defendant appellant.

CAMPBELL, Judge.

[1, 2] The defendant assigns as error the action of the trial judge in setting aside the verdict and granting a new trial.

Under G.S. 1A-1, Rule 59(a) (6), a judge may grant a new trial to any party on the grounds that inadequate damages were awarded which appear to have been given under the influence of passion or prejudice. A motion in this regard is directed to the sound discretion of the trial judge and it is established that "[w]hile the necessity for exercising this discretion, in any given case, is not to be determined by the mere inclination of the judge, but by a sound and enlightened judgment in an effort to attain the end of all law, namely, the doing of even and exact justice, we will yet not supervise it, except, perhaps, in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited." *Goldston v. Chambers*, 272 N.C. 53, 59, 157 S.E. 2d 676, 680 (1967), quoting *Settee v. Electric Ry.*, 170 N.C. 365, 367, 86 S.E. 1050, 1051 (1915).

We have reviewed the record and fail to find such extreme circumstances as would render this case reviewable. Consequently, this appeal is

Dismissed.

Judges PARKER and VAUGHN concur.

State v. Spicer

STATE OF NORTH CAROLINA v. CURLEY SPICER

No. 7429SC715

(Filed 16 October 1974)

Assault and Battery § 14— felonious assault — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injuries not resulting in death where it tended to show that defendant stated he was going to kill his estranged wife and the victim, that defendant pulled a gun and shot the victim twice and that defendant fired another shot at the victim while he was running to a witness's car for help.

APPEAL by defendant from *Martin, Judge*, May 1974 Session of RUTHERFORD Superior Court. Heard in the Court of Appeals 17 September 1974.

Defendant was charged in a bill of indictment with felonious assault with a deadly weapon with intent to kill inflicting serious injuries, not resulting in death. He pleaded not guilty.

The evidence for the State tended to show that the victim of the assault had been dating the defendant's wife after the defendant and she were separated and living apart; that the defendant, his wife, their children, and the victim were riding in the victim's car to the defendant's house; that the defendant got out of the car and went into the house to get some money for his wife and children; that upon returning the defendant announced "... I have something for both of you. ... I'm going to kill both of you."; that the defendant pulled a gun and shot the victim twice whereupon the victim began running to a witness's car for help; and that the defendant fired another shot at him while he was running away.

Upon denial of a motion to dismiss, the defendant testified that he was threatened by the victim; that the victim reached in his pocket, presumably for a gun; that he shot him in this belief; that his hand then came out of his pocket and no gun was present; that the victim began running away; and that he did not shoot at him again. Defendant's motion for dismissal as of nonsuit was renewed and was denied.

The judge then charged the jury on the various degrees of assault, and the jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury; and from a sentence

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imposing imprisonment from five to seven years in prison, the defendant appealed.

Attorney General James H. Carson, Jr., by Assistant Attorney General Charles R. Hassell, Jr., for the State.

George R. Morrow for the defendant appellant.

CAMPBELL, Judge.

The defendant contends that the trial court erred in overruling defendant's motion for nonsuit. "On such motion the evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom. . . . Only the evidence favorable to the State is considered, and defendant's evidence relating to matters of defense or defendant's evidence in conflict with that of the State is not considered." *State v. Everette*, 284 N.C. 81, 84, 199 S.E. 2d 462, 465 (1973).

Taking the evidence in the light most favorable to the State and disregarding that evidence of the defendant which is in conflict, it is established that there was sufficient evidence to go to the jury. The case was submitted to the jury free from prejudicial error.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. MELVIN SUTTON

No. 748SC601

(Filed 16 October 1974)

Criminal Law § 102— solicitor's question — use of defendant's testimony
— no error

The trial court did not err in overruling defendant's objection to the solicitor's use of defendant's testimony in phrasing a question to a witness for the defense, since the solicitor did not misquote or misinterpret the defendant's testimony.

ON *certiorari* to review the order of *James, Judge*, 29 October 1973 Session of Superior Court held in WAYNE County. Heard in the Court of Appeals 17 September 1974.

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The defendant was charged in a bill of indictment with the felony of larceny of an automobile. A plea of not guilty was entered, and a verdict of guilty as charged was returned. From an active sentence of not less than seven years nor more than eight years imposed thereon, the defendant gave notice of appeal.

Attorney General Carson, by Assistant Attorney General Webb, for the State.

Roland C. Braswell, for the defendant.

BROCK, Chief Judge.

The only assignment of error presented by the defendant in the record on appeal is his argument that the trial court erred when it overruled defendant's objection to the solicitor's use of defendant's testimony in phrasing a question to a witness for the defense. The solicitor stated: "All right, so if he (defendant) said that you all sat in the car and drank wine and beer and got high, that's not true is it?" "Counsel shall not knowingly misinterpret the contents of a paper, the testimony of a witness, the language or argument of opposite counsel or the language of a decision or other authority. . . ." Superior and District Court Rule 12. There is no suggestion that the district attorney misquoted or misinterpreted the defendant's testimony in this case. We find no prejudicial error in the ruling of the trial court.

Defendant presents the record for review for possible errors. We have carefully reviewed the record. In our opinion defendant had a fair trial free from prejudicial error.

No error.

Judges MORRIS and MARTIN concur.

Schafran v. Cleaners

HARRY SCHAFRAN v. A & H CLEANERS, INC.

No. 7411SC640

(Filed 16 October 1974)

Appeal and Error § 39— extension of time to docket appeal — order improperly entered

Trial judge was without authority to extend the time for docketing the case on appeal where such motion was made after the 90 day period allowed for docketing had elapsed.

DEFENDANT appeals from *Webb, Judge*, 25 February 1974 Civil Session of HARNETT Superior Court.

Defendant has appealed from an order denying his motion under G.S. 1A-1, Rule 60(b) (2) for relief from a final judgment on the basis of newly discovered evidence which, he alleges, by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). The facts underlying the final judgment are set out in *Schafran v. Cleaners, Inc.*, 19 N.C. App. 365, 198 S.E. 2d 734 (1973), *cert. denied*, 284 N.C. 255, 200 S.E. 2d 655 (1973).

Bryan, Jones, Johnson, Hunter & Greene and Woodall & McCormick, by Edward H. McCormick, for plaintiff appellee.

Pearson, Malone, Johnson, DeJarmon & Spaulding, by W. G. Pearson II and C. C. Malone, Jr., for defendant appellant.

MARTIN, Judge.

The order appealed from was entered on 25 February 1974. Motion to extend the time for docketing the case on appeal was made on 3 June 1974, and granted by the trial judge on 4 June 1974, both after the expiration of the 90 day period allowed within which to docket the record on appeal. The trial judge had no authority to extend the time for docketing by an order entered after the expiration of the 90 days allowed by Rule 5. *Brown v. Smith*, N. C. Court of Appeals (filed 2 October 1974); *Lambert v. Patterson*, 17 N.C. App. 148, 193 S.E. 2d 380 (1972); *State v. Lassiter*, 18 N.C. App. 208, 196 S.E. 2d 592 (1973). Failure to comply with Rule 5 of the Rules of Practice in the Court of Appeals subjects the case to dismissal under Rule 17, Rules of Practice in the Court of Appeals.

Appeal dismissed.

Chief Judge BROCK and Judge MORRIS concur.

Produce v. Massengill

L. E. JOHNSON PRODUCE v. JAMES MASSENGILL

No. 7411SC569

(Filed 16 October 1974)

1. Execution §§ 1, 16; Husband and Wife § 15— judgment against husband — execution — rents and profits

While property held by the entirety is not subject to execution to satisfy judgments against one spouse, proceeds of entirety property are the property of the husband as against the wife and may be applied against debts of the husband alone; however, the judgment creditor is not entitled to have a receiver appointed to take possession of the land itself in order to rent the property and apply the rentals to the payment of the judgment.

2. Execution §§ 1, 16— judgment against husband — execution unsatisfied — entirety property — receiver — collection of profits — no authority to rent

Where judgment was obtained against the husband, execution was returned unsatisfied and a receiver was appointed “to rent and collect the rents and profits from the tobacco allotment” on land held by the entirety, the portion of the order permitting the receiver “to rent” the property must be stricken.

DEFENDANT appeals from *Hobgood, Judge*, 14 January 1974 Civil Session of JOHNSTON County Superior Court.

Plaintiff obtained a judgment against defendant at the 15 January 1971 Civil Session of Johnston County Superior Court, and in *Johnson v. Massengill*, 280 N.C. 376, 186 S.E. 2d 168 (1972) the court found no error in the trial. On two occasions plaintiff caused execution to issue on the judgment, and each time execution was returned unsatisfied. Defendant now appeals from a decree of Judge Hobgood ordering the appointment of a receiver “to rent and collect the rents and profits from the tobacco allotment on said lands.”

L. Austin Stevens, for plaintiff appellee.

Mast, Tew & Nall, by George B. Mast and Joseph T. Nall, for defendant appellant.

MARTIN, Judge.

[1, 2] Defendant argues the trial court erred in appointing a receiver to rent the property involved in that said property is

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owned as tenants by the entirety. That portion of the trial court's order in question reads:

"That the plaintiff is entitled to the appointment of a receiver to collect the rents and profits from the lands owned by the defendant and his wife, as tenants by the entirety, and R. E. Batton is hereby appointed a receiver of this Court to rent and collect the rents and profits from the tobacco allotment on said lands"

"Property held by the entirety is not subject to execution to satisfy judgments against one spouse. (Citations.) However, *proceeds* of entirety property are the property of the husband as against the wife and such proceeds may be applied against debts of the husband alone. *Lewis v. Pate*, 212 N. C. 253, 193 S.E. 20 (1937)." *Hodge v. Hodge*, 12 N.C. App. 574, 575-576, 183 S.E. 2d 800 (1971). Justice Sharp, concurring in *Gas Co. v. Leggett*, 273 N.C. 547, 554, 161 S.E. 2d 23 (1968), points out:

"The judgment creditor, however, is not entitled to have a receiver appointed to take possession of the land itself in order to rent the property and apply the rentals to the payment of the judgment. *Grabenhofer v. Garrett*, 260 N.C. 118, 131 S.E. 2d 675; 2 Lee, N. C. Family Law § 116 (3d ed. 1963)."

Since the trial court's order may be interpreted to permit the receiver to rent the property in question, we hereby delete the words "rent and" from that portion of the order set out above and affirm the order as modified.

Modified and affirmed.

Chief Judge BROCK and Judge PARKER concur.

JAMES STEPHEN MCKINNEY, T/A SEVEN DWARFS v. NORTH CAROLINA BOARD OF ALCOHOLIC CONTROL, DR. L. C. HOLSHOUSER, MARCUS T. HICKMAN AND GEORGE L. COXHEAD, MEMBERS OF THE BOARD

No. 7410SC572

(Filed 16 October 1974)

Intoxicating Liquor § 2— beer permit — lewd, immoral, improper entertainment — proper supervision — constitutionality of statutes

G.S. 18A-34(a)(4) and G.S. 18A-43(a) are not unconstitutionally vague in failing to advise the holder of an on-premises beer permit and

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others what constitutes "lewd, immoral, or improper entertainment, conduct, or practices" and what constitutes "proper supervision" of the premises.

APPEAL by plaintiff from *McLelland, Judge*, 26 March 1974 Session, WAKE County Superior Court. Heard in the Court of Appeals 24 September 1974.

Plaintiff was the holder of an on-premises beer permit in Fayetteville, North Carolina. By order dated 19 November 1973, the North Carolina Board of Alcoholic Control suspended this beer permit for a period of 120 days. This action followed a hearing which had been conducted by a hearing officer on 24 September 1973. The Board found as a fact that the plaintiff-petitioner "unlawfully and knowingly permitted on your licensed premises lewd, immoral and improper entertainment, conduct and practices on March 9, 1973, at 10:15 and 10:37 p.m. in violation of G.S. 18A-34(a) (4) ; and failed to give your licensed premises proper supervision on or about March 9, 1973 at 10:15 and 10:37 p.m. in violation of G.S. 18A-43(a)."

From this action by the Board, the plaintiff filed a petition for judicial review contending that the Board had acted pursuant to statutes and regulations which were unconstitutionally vague and deprived the plaintiff of due process of law.

Judge McLelland, upon review, found that the findings of fact and decision of the Board were supported by competent, material and substantial evidence and that the provisions of the law were constitutional and not unduly vague. The plaintiff appealed to this Court.

Attorney General James H. Carson, Jr., by Associate Attorney James Wallace, Jr., for defendant appellees.

Bryan, Jones, Johnson, Hunter & Greene by Robert C. Bryan for plaintiff appellant.

CAMPBELL, Judge.

The procedure followed in this case in all respects complies with the principles laid down in *Wholesale v. ABC Board*, 265 N.C. 679, 144 S.E. 2d 895 (1965). The only contention being made by the plaintiff is that G.S. 18A-34(a) (4) and G.S. 18A-43(a) are unconstitutionally vague in failing to advise the petitioner or others what conduct is in fact "lewd, immoral, or improper entertainment, conduct, or practices" and what

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conduct constitutes "proper supervision" of the premises. We are of the opinion that the statutes and the regulations which were in effect at the time of this suspension were not too vague and are constitutionally valid within the rule set out in *California v. La Rue*, 409 U.S. 109, 34 L.Ed. 2d 342 (1972).

We refrain from setting out the acts and conduct set out in the evidence. Suffice it that we have reviewed all of the proceedings, and the judgment of the Superior Court of Wake County is

Affirmed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. LEWIS CLARK PITTMAN, JR.

No. 7410SC649

(Filed 16 October 1974)

1. Criminal Law § 66— admissibility of in-court identification

In a prosecution for larceny of merchandise from a store, the trial court did not err in the admission of an in-court identification of defendant where the court found upon supporting voir dire evidence that the witness had an adequate opportunity to observe defendant while he was in the store and that any view she had of defendant while he was in the custody of police officers was not such as to taint the in-court identification.

2. Larceny § 7— sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for larceny of three shotguns from a department store.

APPEAL by defendant from *Webb, Special Judge*, 1 January 1974 Special Criminal Session, WAKE County Superior Court. Heard in the Court of Appeals 23 September 1974.

The defendant was tried on a bill of indictment, in proper form, for felonious larceny of three 12-gauge automatic shotguns.

The State's evidence was to the effect that about 11:00 a.m. on the morning of 14 September 1973, Mrs. Clifton, a security officer at Hudson-Belk Department Store, observed the defendant in the sporting goods department. She was attracted to the

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defendant by a large, green bag that he was carrying. She observed him for some ten minutes while he looked at various items of merchandise in the sporting goods department. The defendant then went into a stockroom which was marked for employees only. Mrs. Clifton went to the door of the stockroom and waited for the defendant to emerge. When the defendant came out of the stockroom, he was carrying three white boxes in the green bag. Mrs. Clifton requested that he stop, but instead of doing so, he proceeded on towards the exit. Mrs. Clifton called to one of the sales managers who likewise attempted to stop the defendant. The defendant ran out the door with the sales manager in pursuit. On arriving at the door, the defendant threw down the green bag, and from it, Mrs. Clifton retrieved the three automatic shotguns. The sales manager, with the assistance of Raleigh police officers, apprehended the defendant some two blocks away in a hotel. The arrest of the defendant occurred within only a few minutes after he left the store, and at all times there had been hot pursuit.

From a verdict of felonious larceny and the imposition of a prison sentence of not less than three nor more than five years, the defendant appealed.

Attorney General James H. Carson, Jr., by Associate Attorney Archie W. Anders for the State.

J. Michael Weeks for defendant appellant.

CAMPBELL, Judge.

[1] The defendant presents for review the in-court identification of the defendant by Mrs. Clifton. The trial court conducted a voir dire examination of Mrs. Clifton and found as a fact that she had had adequate opportunity to observe the defendant while he was in the store and any view of him that she had while he was in custody of the police officers was not such as to taint the in-court identification. We think the evidence before the trial court was ample to sustain this finding, and there was no error in permitting the in-court identification of the defendant by Mrs. Clifton.

[2] The defendant also assigns as error the denial of his motion for judgment as of nonsuit. There is no merit in this assignment of error for that the evidence was ample for submission to the jury.

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We have reviewed the court's instructions to the jury and find them to be without error.

The defendant had a fair trial free from prejudicial error, and we find

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. PERCY BRYANT

No. 747SC759

(Filed 16 October 1974)

Criminal Law § 146— prayer for judgment continued — no appeal

A prayer for judgment continued is not a final judgment and is therefore not appealable.

ON *certiorari* to review judgment of *Lanier, Judge*, entered at the 28 November 1973 Session of Superior Court held in WILSON County. *Certiorari* was allowed on 16 May 1974 and the case was argued in the Court of Appeals on 18 September 1974.

Defendant was charged in a two-count bill of indictment with (1) felonious breaking and entering and (2) felonious larceny. The jury returned a verdict of guilty as charged. The court entered judgment imposing a prison sentence on the felonious breaking and entering charge but continued prayer for judgment on the felonious larceny charge. Defendant appealed.

Attorney General James H. Carson, Jr., by Assistant Attorney General Charles A. Lloyd, for the State.

Bobby G. Abrams for the defendant appellant.

BRITT, Judge.

The assignment of error that defendant stresses is that the trial judge failed to charge the jury as to misdemeanor larceny, a lesser included offense of felonious larceny. The assignment has no merit.

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It is well established that a "prayer for judgment continued" is not a final judgment, therefore, it is not appealable. See *State v. Griffin*, 246 N.C. 680, 100 S.E. 2d 49 (1957); *State v. Pledger*, 257 N.C. 634, 127 S.E. 2d 337 (1962). Since prayer for judgment was continued on the felonious larceny charge, a final judgment was not entered on that charge and any error committed with respect thereto is not reviewable at this time.

As to the other assignments of error, we have reviewed the records and briefs and find that they too are without merit.

No error.

Judges HEDRICK and BALEY concur.

STATE OF NORTH CAROLINA v. JOHN H. COLEY

No. 7419SC628

(Filed 16 October 1974)

Burglary and Unlawful Breakings § 7— failure to submit non-felonious breaking and entering

In a prosecution for felonious breaking and entering of a dwelling house with intent to commit larceny, the trial court did not err in failing to instruct on the lesser included offense of non-felonious breaking and entering where the State's evidence tended to show that defendant was in the house after the break-in, that window panes were broken and glass scattered on the floor, and that frozen food had been removed from a freezer and packed ready to be carried out, and where such evidence was uncontradicted except for defendant's testimony that he was elsewhere when the crime occurred.

APPEAL by defendant from *Crissman, Judge*, 25 March 1974 Session of Superior Court held in RANDOLPH County.

Heard in Court of Appeals 3 September 1974.

Defendant was charged in a bill of indictment with feloniously breaking and entering the dwelling house of Lucile Cranford on 9 October 1973 with the intent to commit larceny. He entered a not guilty plea and was convicted by a jury.

From judgment imposing a prison sentence, defendant has appealed to this Court.

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Attorney General Robert Morgan, by Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Alfred N. Salley, for the State.

Coltrane and Gavin, by W. E. Gavin, for defendant appellant.

BALEY, Judge.

Defendant contends that the court did not adequately explain to the jury the elements of the offense of breaking and entering with intent to commit a felony and did not instruct the jury with respect to the lesser included offense of non-felonious breaking and entering.

The State's evidence placed defendant in the house after the break-in. Window panes were broken and glass scattered on the floor. Three bags of frozen food had been removed from a freezer and packed ready to be carried out. Defendant's companion had a package of frozen food in his pocket as he and defendant prepared to leave. Defendant left hurriedly after the State's witness telephoned the sheriff. This evidence was uncontradicted except that defendant testified he was cutting logs at a sawmill and was not present in the Cranford house at the time claimed by the State's witness and knew nothing about the entry.

There was no evidence tending to show a non-felonious breaking and entering. Defendant simply denied that he committed any offense. It was not necessary for the court to give an instruction concerning a lesser included offense.

"Where all the evidence tends to show that the crime charged in the indictment was committed, and there is no evidence tending to show commission of a crime of less degree . . . the court correctly refuses to charge on the *unsupported lesser degree*." *State v. Duboise*, 279 N.C. 73, 80, 181 S.E. 2d 393, 397. *State v. Griffin*, 280 N.C. 142, 185 S.E. 2d 149. "Where there is no conflict in the evidence the mere contention that the jury might accept the evidence in part and reject it in part is not sufficient to require an instruction on a lesser included offense." *State v. Gurkin*, 8 N.C. App. 304, 306, 174 S.E. 2d 20, 22; *State v. McIntyre*, 13 N.C. App. 479, 186 S.E. 2d 207, *rev'd on other grounds*, 281 N.C. 304, 188 S.E. 2d 304.

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The court summarized the evidence and gave full instructions concerning the breaking and entering without consent of the owner or person in charge of the building and concerning the required felonious intent to steal and deprive the owner permanently of her property. The instruction covered all essential elements of the offense with which defendant was charged and properly applied the evidence to the law.

No error.

Judges BRITT and HEDRICK concur

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MARRIOTT FINANCIAL SERVICES, INC. v. CAPITOL FUNDS, INC.
AND LAWYERS TITLE INSURANCE CORPORATION

No. 7410SC546

(Filed 6 November 1974)

1. Cancellation and Rescission of Instruments § 4— unilateral mistake of law — validity of contract

The trial court erred in concluding that no legally valid contract for the sale of land was formed between the parties because the sale was closed under a mutual mistake of fact where the evidence disclosed that the purchaser acted under a mistake of law, unilateral to it and neither participated in nor induced by the seller, in believing that a city traffic engineer had authority to issue a driveway permit for the subject property and that the engineer had issued such a permit to the purchaser.

2. Deeds § 7; Municipal Corporations § 30; Vendor and Purchaser § 3— subdivision control ordinance — sale of land by reference to unapproved plat — misdemeanor — validity of deed

Enabling statute and city ordinance making it a misdemeanor to describe land in any contract of sale, deed, or other instrument of transfer by reference to a subdivision plat that has not been properly approved and recorded does not render void or voidable a contract for the sale of land on the ground that the seller did not obtain city council approval of a subdivision plat as required by the ordinance.

3. Cancellation and Rescission of Instruments § 2— cancellation for fraud — absence of representations

Sale of land was not subject to rescission on the ground of fraud because the seller had not obtained city council approval of a plat and the purchaser was unable to obtain a driveway permit where there was no evidence that the seller made any representation by word or conduct that it had ever sought city council approval or a driveway permit.

4. Contracts § 16— conditions precedent

Conditions precedent are not favored in the law and provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such construction.

5. Contracts § 16— sale of land — driveway permit not condition precedent

In an action to rescind a sale of land, plaintiff failed to show that the issuance of a driveway permit by a city was a condition precedent of the contract of sale.

6. Deeds § 23— covenant of warranty — subdivision control ordinance — failure to obtain approval of plat

The existence of a city's subdivision control ordinance was not an encumbrance on title, and failure by the seller of land to obtain city council approval of a plat filed pursuant to the ordinance did not constitute a breach of covenant of warranty.

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7. Insurance § 148— title insurance — encumbrances — marketable title — subdivision control ordinance — failure to obtain approval for plat

The existence of a city's subdivision control ordinance and failure of the seller of land to obtain city council approval of a plat filed pursuant to the ordinance did not constitute a defect in or lien or encumbrance on title or render the title unmarketable within the meaning of a title insurance policy on the land.

8. Insurance § 148— title insurance — access to and from property — commercial property — pedestrian access only

Provision of a title insurance policy insuring against loss resulting from "lack of a right of access to and from the land" applies only when the insured landowner has no right of access to and from the land and does not provide coverage because the landowner may not have the particular type of access which he deems most advantageous to him; therefore, the provision was inapplicable where the landowner was unable to obtain a driveway permit for commercial property but there was full and unhampered pedestrian access to and from the property.

APPEAL by defendant, Capitol Funds, Inc., and cross-appeal by plaintiff, from *McLelland, Judge*, 28 January 1974 Session of Superior Court held in WAKE County.

Civil action brought by the purchaser to rescind a sale of land or in the alternative to recover on a policy of title insurance.

Defendant, Capitol Funds, Inc., is the successor by corporate merger to Capitol City Plaza, Inc., the two corporations being treated for purposes of this case as one entity and being hereinafter referred to simply as "Capitol." By warranty deed dated 14 March 1969 recorded 21 March 1969 Capitol, in exchange for \$75,000.00, conveyed to plaintiff, Marriott Financial Services, Inc., a tract of land fronting approximately 240 feet on the west side of Old Wake Forest Road in Raleigh. The property has a depth of 150 feet and its southern boundary is the center line of Crabtree Creek, which flows under a bridge which carries Old Wake Forest Road over the creek at the southeast corner of the property. Defendant, Lawyers Title Insurance Corporation, issued to Marriott its policy insuring fee simple title to the property.

Marriott brought this action on 13 October 1971 seeking to rescind the transaction by which it acquired title to the property and to recover from Capitol \$75,000.00 paid for the property plus \$1,042.47 which it paid on account of 1970 ad valorem taxes. In the alternative, Marriott seeks recovery of

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these amounts from Lawyers Title. By agreement, the case was heard by the court without a jury.

Marriott's evidence showed the following: The subject property is a portion of a larger tract formerly owned by Capitol. In 1967 Capitol conveyed to Al Smith Buick, Inc., the part of the larger tract fronting on Old Wake Forest Road and adjoining the subject property on the north and west. In connection with this conveyance, Capitol made no application to obtain the approval of the Raleigh Planning Commission or the Raleigh City Council under the provisions of The Subdivision Standards Ordinance of the City of Raleigh. However, after the conveyance was made, Al Smith Buick, Inc., did apply for and obtain such approvals and in connection therewith a plat entitled "Property of Al Smith Buick, Inc.," was submitted to and approved by the City Council and was recorded in the office of the Register of Deeds of Wake County. This plat showed the boundaries of the lot which Capitol conveyed to Al Smith Buick, Inc., and also showed the adjoining lot, title to which was then being retained by Capitol and which Capitol subsequently conveyed to Marriott. Before the Raleigh city officials approved this plat for recording, a notation was placed thereon opposite an arrow which pointed to the portion of the property subsequently conveyed to Marriott, "Not an Approved Lot," and this notation was on the plat when it was signed by the corporate secretary of Capitol. The Director of City Planning for the City of Raleigh testified that the City Council, because of the heavy traffic on Old Wake Forest Road, had adopted a policy of not permitting any driveway connections into Old Wake Forest Road within 150 or 200 feet from the abutments on the bridge on which the road crosses over Crabtree Creek, and that the City Planning Commission and the City Council did not approve the lot shown on the plat as "Not an Approved Lot" because "they suspected that had they done so, they would have been a party to having to allow a driveway, which they didn't want to do."

In 1968 Mr. Walter L. Pippin, a real estate broker from Greensboro who dealt primarily in commercial and industrial properties, became interested in the lot which is the subject of the present litigation. Mr. Pippin made it his practice to search for locations which he thought were suitable for businesses and "then either list them or take an option on them and try to find a buyer." In following this practice, Mr. Pippin

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found the subject property and determined from the tax records that it was owned by Capitol and that Mr. D. W. Royster, Sr., President of Capitol, who lived in Shelby, N. C., was the person to contact. Mr. Pippin went to Shelby and obtained from Capitol, for the payment of \$1,000.00, a written option agreement dated 25 October 1968 by which Capitol gave Pippin the right until 1 March 1969 to purchase the subject property for \$75,000.00 cash, less the sum paid for the option, the deed to be made to Pippin or "designated owners." By letter dated 27 February 1969 Pippin notified Capitol that he exercised the option, this letter stating:

"The exercise of the option is subject to our attaining driveway permits, which should be completed next week."

On 28 February 1969 Capitol responded in a letter addressed to Pippin which contains the following:

"We understand that the exercise of this option is subject to obtaining driveway permit and that you expect to complete same within the next week."

Pippin testified that at the time of exercising the option he had obtained a purchaser, the KDK Corporation, which planned to place a Roy Rogers Drive-In Restaurant on the property. Later it was decided that Marriott was to be the purchaser and KDK would lease from Marriott. A few days after Pippin notified Capitol of exercise of the option subject to attaining driveway permits, Pippin's son came to Raleigh and obtained on a plat of the subject property a handwritten notation, "O.K. one 45' Dr. to Wake For. Rd at north parking isle." This notation was dated 2 March 1969 and was signed by Don Blackburn, who was Traffic Engineer for the City of Raleigh. Blackburn did not have authority to bind the City of Raleigh to give a driveway permit.

The sale was closed on 21 March 1969. The price to Marriott was \$90,000.00, of which Capitol received \$75,000.00 and Pippin \$15,000.00. Following closing of the sale Marriott applied to the Raleigh Planning Commission and to the Raleigh City Council for approval of the subdivision of the lot which Capitol had conveyed to Marriott. On 18 August 1969 the Raleigh City Council adopted a resolution denying the application, the resolution finding that:

"It would be contrary to the public, peace, safety, and welfare of the inhabitants of the City of Raleigh to approve

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any subdivision allowing access to Wake Forest Road within 200 feet of the Crabtree Creek Bridge in that said access would create a visual traffic and safety hazard and would in fact violate an established policy of the City."

Thereafter, Marriott demanded and received a refund of \$15,000.00 from Pippin, and Marriott tendered a reconveyance to Capitol on condition Capitol refund to Marriott the purchase price of \$75,000.00 and the amount of the 1970 ad valorem taxes which Marriott had paid, which tender was refused by Capitol.

At the conclusion of the evidence the court allowed motion of Lawyers Title under Rule 41(b) to dismiss, denied Capitol's similar motion, and entered judgment making findings of fact on which the court concluded that both parties to the conveyance mistakenly believed when the sale was closed that the City of Raleigh had granted the buyer a driveway permit and "[t]hat by reason of mutual mistake a contract legally valid was not formed between the parties." The judgment directed that Marriott be allowed to rescind, that it recover from Capitol \$75,000.00 plus the amount paid as taxes, and that Marriott reconvey the property to Capitol.

From this judgment Capitol appealed, including among its assignments of error the denial of its Rule 41(b) motion to dismiss and the court's conclusion that because of mutual mistake no legally valid contract had been formed. Marriott, while seeking to uphold the judgment, filed a cross-appeal, assigning as errors the court's failure to conclude that Marriott had a right to rescind on certain additional grounds alleged in its complaint. In the alternative and in case its judgment against Capitol should be reversed, Marriott appealed from the portion of the judgment which granted the motion of Lawyers Title to dismiss Marriott's claim as to that defendant.

Manning, Fulton & Skinner by Howard E. Manning and John B McMillan for plaintiff appellee and cross-appellant, Marriott Financial Services, Inc.

Maupin, Taylor & Ellis by Armistead J. Maupin and Thomas W. H. Alexander for defendant appellant, Capitol Funds, Inc.

Poyner, Geraghty, Hartsfield & Townsend by John L. Shaw and Cecil W. Harrison, Jr., for defendant appellee, Lawyers Title Insurance Corporation.

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PARKER, Judge.

APPEAL BY DEFENDANT
CAPITOL FUNDS, INC.

In concluding that by reason of mutual mistake no legally valid contract was formed between the parties, the trial court cited and relied upon *MacKay v. McIntosh*, 270 N.C. 69, 153 S.E. 2d 800 (1967). That case, however, is distinguishable on its facts from the case now before us and the holding in that case is not dispositive of the question presented by Capitol's appeal. In that case the defendant resisted specific performance of a contract by which she had agreed to purchase real property from plaintiff on the grounds that it had been the intention of plaintiff's sales agent to sell and the intention of defendant to purchase only land zoned for business; that the contract was entered into by defendant as result of an innocent misrepresentation of plaintiff's agent to the effect that the property was zoned for business, whereas in fact it was not so zoned. Our Supreme Court affirmed judgment granting rescission, citing 17 Am. Jur. 2d, Contracts, § 143, p. 490, to the effect that a contract may be avoided on the ground of mutual mistake of fact where the mistake is common to both parties and by reason of it each has done what neither intended. In so holding the Court, in an opinion by Bobbitt, J. (now C.J.), said: "In our opinion, and we so hold, whether the subject property was within the boundaries of an area zoned for business is a factual matter; and, under the evidence, the mutual mistake as to this fact related to the essence of the agreement."

[1] In the case now before us there was no evidence of any mutual mistake of fact. The only mistake shown by the evidence was that made by Marriott when it assumed that a legally effective permit allowing driveway access into the property from Old Wake Forest Road had been obtained from the City of Raleigh. Insofar as the evidence discloses Marriott made this assumption solely on the basis of the notation made on the plat obtained by Pippin's son. This notation was signed by Blackburn, Raleigh City Traffic Engineer, and Marriott's mistake was in assessing the extent of Blackburn's legal authority to bind the City, a mistaken judgment in which Capitol in no way participated. From the exchange of letters between Pippin and Capitol when Pippin gave notice of exercise of the option, it was clear that Pippin, not Capitol, assumed responsibility to obtain the driveway permit. Pippin did not represent Capitol,

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and Capitol cannot be held responsible for such reliance as Marriott may have placed upon him with reference to the driveway permit. There was no evidence that any agent of Capitol ever assumed any responsibility, undertook any action, or at the time the sale was closed even had any knowledge as to what actions had been undertaken by Pippin or Marriott or anyone else to obtain the driveway permit. There was no evidence to support a finding that any agent of Capitol knew or had any responsibility to know whether such a permit had or had not been obtained at the time the sale was closed. Specifically, there was no evidence to support the trial court's finding, a factual finding though included among the court's conclusions, "[t]hat both parties to the conveyance mistakenly believed that the City of Raleigh had granted the buyer a driveway permit."

Among the court's conclusions was also the factual finding "that the City's prior determination by A. C. Hall, Jr., Planning Director, not to issue a permit for a driveway to Old Wake Forest Road was a fact subsisting at the time of the making of this contract for sale and of the sale of this lot." Again, there was no evidence to support such a finding. A. C. Hall, Jr., the Director of City Planning for the City of Raleigh, did testify to a restrictive policy which had been adopted by the City Council not to permit driveway access into Old Wake Forest Road within 150 or 200 feet of the bridge, but there was no evidence that the City had made any "prior determination" concerning driveway access specifically applicable to the lot here in question. The notation on the Al Smith Buick Company plat referring to Capitol's lot as "Not an Approved Lot" did not speak directly to approval or disapproval of driveway access but referred to the disapproval of the lot as a subdivided lot pursuant to Sec. 20-5(a) of the Raleigh City Code. That section is part of "The Subdivision Standards Ordinance of the City of Raleigh." Under that Ordinance the City's director of planning is given certain responsibilities, but the issuance of driveway permits is not among them. We note that Sec. 19-23(A) of the Raleigh City Code makes the issuance of driveway permits a function of the director of public works or his duly authorized agent. Insofar as the evidence in the record before us reveals, the determination not to issue a driveway permit directed specifically to the lot here in question and made by officials with power to bind the City was made for the first time in the City Council's Resolu-

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tion adopted on 18 August 1969. This was approximately five months after the sale to Marriott was closed.

There was in this case no evidence that any transaction occurred between Capitol and Marriott or agents of either prior to the actual closing of the sale, and the only thing which then occurred insofar as the evidence discloses was the delivery of the deed and payment of the purchase price. Thus, unlike the situation presented in *MacKay v. McIntosh, supra*, there was here no contract made or transaction undertaken while both parties were acting under a mutual mistake of fact. On the contrary, the only finding which can be supported by the evidence is that Marriott acted under a mistaken judgment, unilateral to it and neither participated in nor induced by Capitol, as to the legal authority held by the Raleigh City Traffic Engineer.

Essentially, what is presented in this case is that a real estate sale was closed while one party, the purchaser, was acting under an erroneous conclusion as to the legal effect of known facts. "[T]his is a mistake of law and not of fact, and the rule is that ordinarily a mistake of law, as distinguished from a mistake of fact, does not affect the validity of a contract." *Greene v. Spivey*, 236 N.C. 435, 73 S.E. 2d 488 (1952). Even should the mistake be considered as one of fact, our Supreme Court has not adopted the doctrine that unilateral mistake, unaccompanied by fraud, imposition, undue influence or like circumstances of oppression is sufficient to avoid a contract. *Tarlton v. Keith*, 250 N.C. 298, 108 S.E. 2d 621 (1959); *Cheek v. R. R.*, 214 N.C. 152, 198 S.E. 626 (1938). But see Annot., 59 A.L.R. 809; 3 Corbin, Contracts, § 608, pp. 669-78 (1960).

Because the evidence fails to support the trial court's findings and conclusion that the sale was closed under a mutual mistake of fact and that because thereof no legally valid contract was formed between the parties, Capitol's assignments of error directed to these findings and conclusion must be sustained.

CROSS-APPEAL BY PLAINTIFF,
MARRIOTT FINANCIAL SERVICES, INC.

In addition to pleading mutual mistake, Marriott alleged as additional grounds for rescission illegality of the conveyance, fraud, breach of condition precedent, and breach of covenant of warranty. By way of cross-appeal Marriott assigns error to the

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court's failure to find and conclude that it was entitled to rescission on the additional grounds alleged. We find no error in the court's rulings in this regard and these assignments of error are overruled.

[2] Marriott's contention that the sale was illegal is grounded in its argument that Capitol had not complied with the provisions of The Subdivision Standards Ordinance of the City of Raleigh. Sec. 20-5(a) of that Ordinance provides:

"Before any real property located within the city or located outside the city within two (2) miles in any direction of the corporate limits shall be subdivided and offered for sale, and before any plat thereof shall be recorded in the registry of Wake County, the subdivision plat thereof shall be approved by the city council, and such approval entered in writing on the plat by the city clerk and treasurer, after first having been submitted to the city planning commission in accordance with the provisions of this chapter."

Sec. 20-11 of the Ordinance directs that the register of deeds shall not file or record a plat of a subdivision of land located within the territorial jurisdiction of the City without the approval of the legislative body as required in the Ordinance and makes null and void the filing or recording of such a plat without the required approval of the municipal legislative body. These provisions are also contained in Section 1 of the enabling legislation, being Chap. 921 of the 1955 Session Laws. Sec. 4 of the enabling Act further provides that "any person who, being the owner or agent of the owner of any land located within the platting jurisdiction granted to the municipality, thereafter transfers or sells such land by reference to a plat which was not recorded in the office of the Register of Deeds of Wake County, showing a subdivision of such land before such plat has been approved by said legislative body, shall upon conviction be guilty of a misdemeanor." What the statute condemns as a misdemeanor is the description of land in any contract of sale, deed, or other instrument of transfer by reference to a subdivision plat that has not been properly approved and recorded. See *State v. McBane*, 276 N.C. 60, 170 S.E. 2d 913 (1969). However, we find nothing in the Ordinance or in the enabling legislation under which it was enacted which expressly or by necessary implication renders any contract, deed, or other instrument either void or voidable. To work so drastic an effect

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upon land titles requires a clearer expression of legislative intent than can be found in the statutes or Ordinance. We hold that the court did not err in concluding "[t]hat the sale by Capitol to Marriott was not illegal, there being nothing in Section 20-5(a), Raleigh City Code, purporting to prohibit or avoid a sale made without prior City Council approval, subjecting the seller in such case only to the criminal penalty for a misdemeanor specified in the General Statutes."

[3] We also agree with the trial court's finding and conclusion "[t]hat the facts do not disclose fraud on the part of Capitol; that Capitol made no representations by word or conduct to Pippin or anyone else that it had or had ever sought City Council approval or a driveway permit." Even had there been evidence of fraud, and we find none in the record, still the burden was upon Marriott to establish it to the satisfaction of the trial court as finder of the facts, and this Marriott failed to do.

[4, 5] There was no error in the trial court's conclusion "[t]hat the issuance of a driveway permit by the City of Raleigh was not a condition precedent of the contract of sale, there being no evidence that any of those involved in the negotiations so regarded that matter at the time." Conditions precedent are not favored in the law and provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such construction. Marriott, which had the burden of proof, failed to produce evidence which would compel a construction finding a condition precedent in the transaction here involved, and there was no error in the trial court's refusal to so find.

[6] Finally, the evidence discloses no breach in the covenants in Capitol's deed to Marriott. The existence of the City's subdivision control Ordinance was not an encumbrance on title, *Fritts v. Gerukos*, 273 N.C. 116, 159 S.E. 2d 536 (1968), and failure to obtain City Council approval on a plat filed pursuant to the Ordinance did not prevent Capitol from conveying fee simple title to Marriott.

[7] We also find no error in the court's granting Lawyers Title's motion to dismiss made under Rule 41(b) on the ground that upon the facts and the law Marriott has shown no right to relief under the policy of title insurance. By that policy Lawyers

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Title insured Marriott, subject to certain expressed "Conditions and Stipulations," against loss by reason of:

"any defect in or lien or encumbrance on the title . . . ; or unmarketability of such title; or lack of a right of access to and from the land."

As above noted, neither the existence of the City subdivision control Ordinance nor the failure to obtain City Council approval on a plat constituted a defect in or lien or encumbrance on the title, *Fritts v. Gerukos, supra*, and Marriott does not contend that any other defect, lien, or encumbrance exists. A "marketable title" is one free from reasonable doubt in law or fact as to its validity, *Pack v. Newman*, 232 N.C. 397, 61 S.E. 2d 90 (1950), and, again as above noted, Marriott's title was not rendered invalid by reason of the existence of the Ordinance or failure to obtain City Council approval of a plat. In this connection, note should also be taken of the express exclusion from coverage contained in paragraph 2 of the "Conditions and Stipulations," which is as follows:

"2. Exclusions from the Coverage of this Policy

"This policy does not insure against loss or damage by reason of the following:

"(a) Any law, ordinance or governmental regulation (including but not limited to building and zoning ordinances) restricting or regulating or prohibiting the occupancy, use or employment of the land, or regulating the character, dimensions, or location of any improvement now or hereafter erected on said land, or prohibiting a separation in ownership or a reduction in the dimensions or area of any lot or parcel of land."

Even if otherwise within the coverage of the policy, any loss by reason of the subdivision control Ordinance was expressly excluded from coverage by the above-quoted provision.

[8] Finally, there has been no showing of any "lack of a right of access to and from the land" within the meaning of those words as contained in the title policy. We construe the policy provision insuring against loss resulting from "lack of a right of access to and from the land" as insuring against the situation which exists when the land in question is land-locked, i.e., the insured land owner has no right of access to and from his land. We do not construe the policy as providing coverage

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because the land owner may not have the particular type of access which he deems most advantageous to him. Here, the evidence shows that the eastern boundary of the land runs with the west right-of-way line of Old Wake Forest Road and borders on the sidewalk thereon. Marriott has full and unhampered pedestrian access to and from its land, and we do not construe the policy as insuring Marriott against any loss resulting from its failure to obtain a driveway permit from the City.

The result is:

On Capitol's appeal, the judgment against it allowing rescission on the grounds of mutual mistake is

Reversed.

On Marriott's appeal, the judgment denying relief upon the other grounds alleged and dismissing the claim against Lawyers Title is

Affirmed.

Chief Judge BROCK and Judge MARTIN concur.

THOMAS HUFF AND WIFE, BARBARA F. HUFF v. BRANTLEY THORNTON, CENTRAL CAROLINA FARMERS EXCHANGE, INC., JOSEPH MILTON FULTON, SR., AND J. W. JENKINS, INC.

No. 749SC519

(Filed 6 November 1974)

1. Rules of Civil Procedure § 50— motion for directed verdict — consideration of incompetent evidence

In passing upon a trial court's ruling denying a defendant's motion for directed verdict, the appellate court must consider all of the evidence, including incompetent evidence erroneously admitted over defendant's objections, since the admission of such evidence may have caused the plaintiff to omit competent evidence of the same import.

2. Rules of Civil Procedure § 50— directed verdict — consideration of evidence on appeal

An assignment of error directed to the trial court's ruling on a motion for directed verdict made under G.S. 1A-1, Rule 50(a), does not present for review rulings on the admission or exclusion of evidence.

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3. Damages § 15— damages to residence — sufficiency of evidence

In an action to recover for damages sustained by plaintiffs when a gasoline tanker truck owned and driven by defendants struck plaintiffs' residence and automobile, evidence was sufficient to withstand defendants' motions for directed verdict where it tended to show that the house was in good condition and was valued from \$25,800 to \$28,500 immediately prior to the accident and from \$3,500 to \$5,800 immediately after the collision, the collision knocked a four foot square hole in the brick veneer of the residence, plastering was cracked, tile flooring was buckled, kitchen cabinets were damaged, the frame of the house was knocked slightly out of square, the roof was raised slightly, doors were jammed shut, and a storm door was broken, and where the evidence tended to show that plaintiffs had to leave their home for 12 to 15 months while repairs were being made, rent on a comparable house was \$150 per month, and the cost of moving was \$250.

4. Damages § 13; Evidence § 56— evidence of value — opinion testimony

In an action to recover damages for injury to real property sustained when defendants' vehicle collided with plaintiffs' residence, the trial court did not err in allowing a witness to express an opinion as to the fair market value of plaintiffs' house immediately prior to the accident, though there was no showing that the witness was familiar with the house prior to the accident, since the evidence did show that the witness was intimately familiar with all the details of the structure as it existed after the accident and only minimal changes had been made in the house except such as directly resulted from the accident.

5. Damages § 13; Evidence § 56— evidence of value — opinion based on replacement cost

Though experienced appraisers generally employ the cost approach, the income approach, and the market comparison approach in arriving at their opinion as to the fair market value of a particular piece of property, the trial court did not err in recapitulating opinion testimony of three witnesses where each witness testified that the opinion he had expressed on direct examination as to pre-accident fair market value of the residence had been his estimate of replacement cost.

6. Damages § 16— instructions — cost of repairing and rebuilding house

In an action to recover damages sustained when defendants' vehicle collided with plaintiffs' residence, the trial court did not err in instructing the jury that in arriving at their determination of fair market value they should consider, in addition to the other evidence, "the evidence of the parties relating to the costs of repairing the house and the costs of rebuilding the house."

7. Damages § 5— injury to residence — loss of use — submission of issue proper

The trial court properly admitted evidence and instructed on loss of use damages, though some of plaintiffs' witnesses testified that in their opinion it would cost more to repair satisfactorily than it would to rebuild, since there was no evidence that plaintiffs' residence

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could not be repaired and since there was evidence that it would be necessary for plaintiffs to move out of the house while it was being repaired.

8. Trial § 13— jury view of damaged house — discretionary matter

The trial court did not abuse its discretion in denying defendants' motion that the jury be permitted to view plaintiffs' residence.

Judge CAMPBELL dissents.

APPEAL by defendants from *McLelland, Judge*, 3 December 1973 Session of Superior Court held in GRANVILLE County.

On 23 December 1971 a collision occurred on U. S. Highway 158 between trucks owned by the corporate defendants and driven by the individual defendants, causing one of the vehicles, a 3000 gasoline tanker truck, to leave the highway and strike plaintiffs' residence and a parked automobile owned by the male plaintiff. This action for damages resulted. Defendants stipulated their joint liability, and the case was submitted to the jury solely on issues of damages. The jury returned verdict that plaintiffs recover \$18,000.00 for damages to real property, that plaintiff, Thomas Huff, recover \$600.00 for damages to his personal property, and that plaintiffs recover \$1,534.00 for loss of use of real property. From judgment on the verdict, defendants appealed.

Watkins, Edmundson & Wilkinson by William T. Watkins and C. W. Wilkinson, Jr. for plaintiff appellees.

Spears, Spears, Barnes, Baker & Boles by Alexander H. Barnes; and Young, Moore & Henderson by Joseph Yates III for defendant appellants.

PARKER, Judge.

[1, 2] Defendants assign error to the denial of their motions for directed verdict and in support of this assignment contend that all of plaintiffs' evidence as to the reduction in the fair market value of their property caused by the accident was incompetent and should have been excluded. In passing upon a trial court's ruling denying a defendant's motion for directed verdict, the appellate court must consider all of the evidence, including incompetent evidence erroneously admitted over defendant's objections. The reason for this rule is that the admission of such evidence may have caused the plaintiff to omit competent evidence of the same import. This rule was long

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recognized in effect under our former practice in reviewing decisions upon motions for nonsuit, *Koury v. Follo*, 272 N.C. 366, 158 S.E. 2d 548 (1968); *Early v. Eley*, 243 N.C. 695, 91 S.E. 2d 919 (1956); *Supply Co. v. Ice Cream Co.*, 232 N.C. 684, 61 S.E. 2d 895 (1950); *Ballard v. Ballard*, 230 N.C. 629, 55 S.E. 2d 316 (1949); *Midgett v. Nelson*, 212 N.C. 41, 192 S.E. 854 (1937); *Morgan v. Benefit Society*, 167 N.C. 262, 83 S.E. 479 (1914), and the reason for the rule continues to apply with equal force in reviewing decisions upon motions for a directed verdict under our new Rules of Civil Procedure. We hold, therefore, that an assignment of error directed to the trial court's ruling on a motion for directed verdict made under G.S. 1A-1, Rule 50(a) does not present for review rulings on the admission or exclusion of evidence. See 5A, Moore's Federal Practice, ¶ 50.03[2], p. 2334. In so holding we do not intend to imply that we agree with defendants' contention that plaintiffs' evidence in this case was incompetent. We shall express our views in that connection later in this opinion insofar as the trial court's rulings on admissions of evidence are properly presented for our review by appropriate assignments of error. At this point, in reviewing the assignment of error relating to denial of defendants' motion for directed verdict, we examine all of the evidence admitted in the present case for the sole purpose of ascertaining if it establishes the amount of plaintiffs' damages with sufficient certainty to permit the jury to answer the issues submitted. If so, defendants' motions for directed verdict were properly denied.

[3] There was uncontradicted evidence that the automobile owned by the plaintiff, Thomas Huff, had a fair market value of \$600.00 just prior to being hit by the tanker truck and had no value after the accident, and on this appeal defendants bring forward no assignment of error relating to the claim for damages to personal property. As to the claim for damages to plaintiffs' residence, the evidence, viewed in the light most favorable to plaintiffs, tended to show: Plaintiffs' residence was a three-bedroom brick-veneer house containing approximately 1200 to 1400 square feet. It was located on a .88 acre tract of land on which there was also located a store operated by plaintiffs. Plaintiffs had purchased the entire .88 acre tract, including the storebuilding and the residence, in 1967 for \$25,000.00. The residence building was approximately 15 years old at the time it was damaged on 23 December 1971. Prior to being

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struck by the tanker truck, it was in good condition. A new roof had been recently installed and the exterior woodwork and a portion of the interior had been recently painted. As a result of being struck by the tanker truck, a hole approximately 4 feet by 4 feet was knocked in the brick veneer at the corner of the residence where the tanker truck hit, plastering in the house was cracked, tile flooring in the kitchen was buckled, kitchen cabinets were damaged, the frame of the house was knocked slightly out of square, the roof was raised slightly, doors were jammed shut, and a storm door was broken. Plaintiffs' witnesses testified as to the fair market value of the residence immediately before and immediately after the accident. In this regard the opinions expressed by plaintiffs' witnesses as to the fair market value immediately before the accident ranged from a low of \$25,800.00 to a high of \$28,500.00 and as to the fair market value immediately after the accident the opinions ranged from a low of \$3,500.00 to a high of \$5,800.00. On the claim for loss of use of real property, there was evidence that it would be necessary that plaintiffs leave their home while it was being repaired, that it would take 12 to 15 months to complete the repairs, that rent on a comparable house would be \$150.00 a month, and that cost of moving would be \$250.00. When we view all of the evidence in the light most favorable to plaintiffs, we find it amply sufficient to withstand defendants' motions for a directed verdict.

[4] Defendants next contend that the court erred in permitting plaintiffs' witness, Daniel, to testify over defendants' objections as to his opinion of the fair market value of the residence immediately prior to the accident. In support of this contention, defendants argue in their brief that it was not established that Daniel was familiar with plaintiffs' home prior to the accident and that he was not tendered as an expert witness to testify in response to a hypothetical question. There was evidence, however, that Daniel had been in the real estate and insurance business since 1945, that he was familiar with prices of real estate in Granville County, and that he had been to the Huff house, though the date of this visit was not shown. His subsequent testimony revealed that he had examined plaintiffs' residence with great care, taking measurements and computing its square footage, and that he was intimately familiar with all details of the structure as it existed after the accident. There was also evidence that only minimal changes had been made in plaintiffs' residence except such as directly resulted from the

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accident. We also note that of all of plaintiffs' witnesses, Daniel gave the lowest before-accident valuation and highest after-accident valuation. We find no prejudicial error in the court's permitting him to express an opinion as to the fair market value of plaintiffs' house immediately prior to the accident.

[5] Under cross-examination, Thomas Huff, one of the plaintiffs, and two of plaintiffs' other witnesses, Clark and Morgan, who were building contractors, each testified that the opinion he had expressed on direct examination as to pre-accident fair market value of the residence had been his estimate of replacement cost. Defendants contend that this testimony elicited by cross-examination so completely destroyed the direct examination testimony of these witnesses that it was error for the judge in charging the jury to recapitulate the direct examination opinion testimony of these witnesses. We do not agree. In the appraisal of property there are three standard approaches, namely, (1) the cost approach, (2) the income approach, and (3) the market comparison approach. See *Redevelopment Comm. v. Panel Co.*, 273 N.C. 368, 159 S.E. 2d 861 (1968). Experienced appraisers generally employ all three approaches in arriving at their opinion as to the fair market value of a particular piece of property. The fact that defendants were able to show by cross-examination that the three witnesses above referred to in this case employed only one of the three standard approaches did not utterly destroy their testimony. It merely permitted the jury to evaluate that testimony better. Appraisal of an individual tract of real property is at best an inexact procedure, and determination of its fair market value, which by standard definition is the price at which it would have sold on a given date in a transaction which never occurred between willing but uncompelled seller and buyer who never existed, can never be arrived at with scientific certainty. In this case we find no error in the portion of the court's charge recapitulating for the jury the testimony of plaintiffs' witnesses.

[6] In *Paris v. Aggregates, Inc.*, 271 N.C. 471, 157 S.E. 2d 131 (1967) our Supreme Court said that "[i]n cases where the injury [to real property] is completed or by a single act becomes a *fait accompli*, and which do not involve a continuing wrong or intermittent or recurring damages, the correct rule for the measure of damages is the difference between the market value of the property before and after the injury." Our Supreme Court has in general adhered to this diminution in value formula as

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the correct rule for determining damages in such cases. *Broadhurst v. Blythe Brothers Co.*, 220 N.C. 464, 17 S.E. 2d 646 (1941); *Owens v. Lumber Co.*, 212 N.C. 133, 193 S.E. 219 (1937); *Construction Co. v. R. R.*, 185 N.C. 43, 116 S.E. 3 (1923). Under some circumstances other courts have held the reasonable cost of restoring or repairing the damage to be an appropriate measure. See Dobbs, Handbook on the Law of Remedies, § 5.1 at 312-18 (1973). In this case the trial court correctly instructed the jury in accord with the formula approved by our Supreme Court that they should award the plaintiffs such amount as the jury should find by the greater weight of the evidence "represents the difference between the fair market values of the plaintiffs' residence immediately before and immediately after the damage occurred." The court also correctly defined fair market value as "the amount which would be agreed upon as a fair price by an owner who wishes to sell but is not obliged to do so, and a buyer who wishes to buy but is not compelled to do so." Defendants do not except to these portions of the court's charge, but they do assign error to the portion of the charge in which the court instructed the jury that in arriving at their determination of fair market value they should consider, in addition to the other evidence, "the evidence of the parties relating to the costs of repairing the house and the costs of rebuilding the house." As to costs of repairs, plaintiffs' witness Morgan estimated that "[i]f the house was not out of square," repair costs of \$9,683.40 "would put the house back into substantially the same condition it was in before the accident," while defendants' witnesses testified to repair costs ranging from a low of \$4,685.00 to a high of "approximately \$10,000.00." Since most of the evidence as to repair costs was supplied by defendants and all of such evidence showed figures substantially less than plaintiffs' evidence tended to show under the diminution in value formula, manifestly defendants could only have been helped, not harmed, by the fact that the court instructed the jury to consider such evidence. As to the court's reference to the evidence as to "the costs of rebuilding the house," if it be assumed that the jury might have understood that the court was referring to some amount greater than the repair costs, such as, for example, the full replacement cost of the residence, yet we find no prejudicial error in the court's making such a reference in the context in which it was made in the court's charge. We note that the court's language could not reasonably be interpreted as conveying to the jury any understanding that they might award full replacement costs

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as the amount of plaintiffs' damages. Rather, it is clear that the court instructed the jury to consider the evidence of the parties as to "the costs of rebuilding the house" only for purposes of arriving at their determination of fair market value, a determination which it was necessary for the jury to make in applying the diminution in value formula. Moreover, as hereinabove noted, the cost approach is at least one of the recognized standard approaches employed in making appraisals of real property. We find no prejudicial error in the portions of the charge complained of.

[7] Defendants assign error to the court's actions admitting evidence concerning loss of use damages and in instructing on that issue. In this connection defendants contend that some of plaintiffs' evidence tended to show that their residence was damaged beyond repair. Defendants argue that if this be true, then plaintiffs should not be permitted to recover for loss of use of their residence for any period of time but should be limited to the diminution in value of their property as the full measure of their damages. However, defendants mistake the purport of plaintiffs' evidence. Although some of plaintiffs' witnesses testified that in their opinion it would cost more to repair satisfactorily than it would to rebuild, there was no evidence that plaintiffs' residence could not be repaired. Since this was so and since there was also evidence that it would be necessary for plaintiffs to move out of the house while it was being repaired, we see no reason why plaintiffs in this case were not entitled to an award of damages for loss of use of their property as well as for the diminution in its value caused by defendants' tort. It would seem necessary that plaintiffs receive such an award if they are to be made whole. The amount awarded by the jury for loss of use was well within the amount which would have been supported by the evidence.

[8] Defendants assign error to the denial of their motion that the jury be permitted to view plaintiffs' residence. Such a motion is addressed to the sound discretion of the trial court. *State v. Ross*, 273 N.C. 498, 160 S.E. 2d 465 (1968); *Paris v. Aggregates, Inc.*, *supra*; *State v. Smith*, 13 N.C. App. 583, 186 S.E. 2d 600 (1972). No abuse of discretion has been here shown.

Defendants noted 82 assignments of error in the record and brought forward many of these in their brief. We have discussed those which we consider the most important and have carefully considered all the remainder. We find no error suffi-

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ciently prejudicial to warrant a new trial. Accordingly, in the trial and judgment appealed from we find

No error.

Judge VAUGHN concurs.

Judge CAMPBELL dissents.

STATE OF NORTH CAROLINA v. JOHNNY EDWARD ZIMMERMAN

No. 7414SC614

(Filed 6 November 1974)

1. Criminal Law § 162— admission of evidence — waiver of objection

When evidence is admitted over objection but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost.

2. Criminal Law § 71— “place of residence” — shorthand statement of fact

An officer's references to defendant's “place of residence” were admissible as shorthand statements of fact.

3. Criminal Law § 34— narcotics case — evidence of traffic violation

In a prosecution for possession of marijuana with intent to distribute, defendant was not prejudiced by an officer's testimony that defendant had run a red light.

4. Criminal Law § 84; Searches and Seizures § 1— warrantless search of automobile seat — legality

Where defendant denied living at the address for which officers had obtained a warrant to search for marijuana, and defendant drove an officer to the premises to be searched, the officer lawfully searched the front seat of defendant's car without a warrant and seized a key fitting the door of the premises to be searched after having observed defendant conceal something in the seat of the car, since the officer had probable cause to believe he would discover evidence of defendant's guilt of a crime.

5. Narcotics § 3— possession with intent to distribute — “ounce bags”

In a prosecution for possession of marijuana with intent to distribute, an officer's testimony that seized bags of marijuana are known on the street as “ounce bags” was relevant to the issue of intent to distribute.

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6. Searches and Seizures § 4— seizure of items not listed in warrant — instrumentalities of crime

Police officers lawfully seized cigarette wrapping papers and a smoking pipe while conducting a search pursuant to a warrant authorizing a search for marijuana only, since such items are instrumentalities of a crime pertaining to marijuana.

7. Searches and Seizures § 4— seizure of items not listed in warrant — mere evidence

Officers may lawfully seize an item constituting "mere evidence" while properly executing a search warrant for another item when (1) there exists a nexus between the item to be seized and criminal behavior, (2) the item is in plain view, and (3) the discovery of that item is inadvertent, that is, the officers did not know its location beforehand and intend to seize it.

8. Searches and Seizures § 4— warrant to search for marijuana — seizure of traffic citation

Officers lawfully seized a traffic citation issued to defendant while executing a warrant authorizing a search for marijuana where the citation was in plain view, the officers could have reasonably believed the citation would aid in conviction of defendant by showing that defendant resided at that address, and officers discovered the citation inadvertently while lawfully on the premises.

9. Criminal Law § 75— volunteered statements by defendant — admissibility

The trial court properly admitted statements made by defendant to officers where the court found upon supporting *voir dire* evidence that the statements were volunteered and were not the result of custodial interrogation.

10. Narcotics § 4.5— possession with intent to distribute — failure to instruct on simple possession

In a prosecution for possession of marijuana with intent to distribute, there was no evidence requiring the court to instruct the jury on the lesser included offense of simple possession of marijuana.

DEFENDANT appeals from *Brewer, Judge*, 14 January 1974 Session of DURHAM County Superior Court. Argued in the Court of Appeals on 23 September 1974.

Defendant was indicted for the felonious possession with intent to distribute a controlled substance, to wit: more than 5 grams of marijuana. State's evidence consisted in part of several exhibits purporting to be evidence obtained from the search of an apartment, and one exhibit stipulated by the parties as an SBI lab report which apparently concludes that the green vegetable substance, introduced into evidence, is marijuana. State's evidence also tended to show that Officer Fuller, a Durham

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policeman, obtained a search warrant for 604 Barnes Avenue. Fuller went to that address and observed the house for a short time until defendant emerged, got into his car with a co-defendant, and drove off. Fuller followed and later stopped defendant, whereupon defendant was informed of the search warrant. Defendant denied living at 604 Barnes Avenue. At this juncture defendant obligingly drove Officer Ray, another Durham policeman, back to 604 Barnes Avenue in defendant's car. At 604 Barnes Avenue, Officer Fuller asked defendant for a key to the door and defendant replied he did not have one. Officer Ray then produced a key which he had procured from defendant's car. Before entering the house there was some concern expressed as to whether a vicious Doberman dog also resided at 604 Barnes Avenue. Once inside, a search was conducted which produced two caches of marijuana. Officer Fuller testified he showed defendant the smaller package of marijuana and defendant said, "How about leaving my smoking stuff in the fuse box, that is what I use myself." Defendant offered no evidence. From a verdict of guilty of possession of marijuana with intent to distribute and a sentence of not less than three nor more than five years, defendant appealed.

Attorney General Carson, by Associate Attorney Sammy R. Kirby, for the State.

Michael C. Troy, for defendant appellant.

MARTIN, Judge.

[1, 2] Defendant has numerous assignments of error. First, defendant contends the trial court erred in allowing Officer Fuller to frequently characterize 604 Barnes Avenue as defendant's "house" or "place of residence." The record discloses a number of occasions in which defendant did not object to such a characterization. It is the well established rule that when evidence is admitted over objection but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost. *State v. Owens*, 277 N.C. 697, 178 S.E. 2d 442 (1971). Furthermore, "Although the word 'residence' is in the nature of a conclusion, it is competent as a shorthand statement of fact describing where the officer went to execute the search warrant." *State v. Williams*, 13 N.C. App. 423, 185 S.E. 2d 604 (1972).

[3] Defendant's second assignment of error relates to Officer Fuller's testimony that defendant had run a red light. We fail

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to see how a passing reference to a traffic violation adversely affected the result of this case. The burden is on defendant not only to show error but also to show that the error complained of affected the result adversely to him. *State v. Barrow*, 6 N.C. App. 475, 170 S.E. 2d 563, *aff'd*, 276 N.C. 381, 172 S.E. 2d 512 (1970). This assignment of error is overruled.

[4] Defendant contends the trial court erred in allowing testimony concerning a key taken from defendant's car which opened the front door at 604 Barnes Avenue in that the key was obtained by an illegal search of the car. In the case at bar, Officer Ray observed a furtive movement by which defendant's clinched fist put something down into the front seat of defendant's car. This occurred as defendant and Officer Ray arrived at 604 Barnes Avenue. A furtive movement under certain circumstances can produce legal justification to search a car. Annot., 45 A.L.R. 3d 581 (1972). "Automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office (citations omitted). The cases so holding have, however, always insisted that the officers conducting the search have 'reasonable or probable cause' to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search." *Dyke v. Taylor Implement Manufacturing Co.*, 391 U.S. 216, 20 L.Ed. 2d 538, 88 S.Ct. 1472 (1968)." *State v. Ratliff*, 281 N.C. 397, 189 S.E. 2d 179 (1972). In *State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973), the Court sets out circumstances under which a warrantless search may be conducted, and the Court states, "Third, a warrantless search of a vehicle capable of movement may be made by officers when they have probable cause to search and exigent circumstances make it impracticable to secure a search warrant. (Citations.)"

Applying the foregoing rules to the facts of this case, we hold that Officer Ray seized the key pursuant to a lawful search. Defendant drove Officer Ray back to 604 Barnes Avenue, a residence which defendant had disowned, where defendant knew a search for marijuana was to be conducted. On *voir dire* examination, Officer Ray stated he saw defendant conceal something in the front seat of defendant's car. Officer Ray said, "I then went around the other side of the car to see what item he had hidden. I found that he had stuck either one or two keys on a chain which appeared to be common lock-type keys, not a car key, like a house key or door lock key." Thus, while lawfully

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present in the car, Officer Ray discovered a key under circumstances where there was probable cause to believe such a key would be evidence of defendant's guilt inasmuch as defendant had denied living at 604 Barnes Avenue. Defendant's third assignment of error is overruled.

[5] In his fourth assignment of error, defendant argues the trial court erred in allowing Officer Fuller to testify concerning the terminology used in connection with marijuana traffic in that such evidence was irrelevant and prejudicial. This assignment of error is overruled. "Strictly speaking, evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." 1 Stansbury, N. C. Evidence, Brandis' Revision, § 77. In the case at bar, the defendant was charged with the felonious possession of a controlled substance with intent to distribute, and Officer Fuller's testimony that the bags of marijuana seized at 604 Barnes Avenue are known on the street as "ounce bags" is relevant to the issue of intent to distribute. See also *State v. Covington*, 22 N.C. App. 250, 206 S.E. 2d 361 (1974), where this Court discusses the competency of a police officer to testify concerning drug traffic in general.

[6] As the fifth assignment of error, defendant argues the trial court erred in denying defendant's motion to suppress the following evidence: cigarette wrapping papers, a smoking pipe, and a traffic citation issued to defendant. These items were seized at 604 Barnes Avenue under a search warrant which only authorized a search for marijuana. Thus, defendant presents the issue whether the trial court erred in admitting into evidence these items which were not particularly described in the search warrant under which authority they were seized. Defendant cites *Marron v. United States*, 275 U.S. 192, 72 L.Ed. 231, 48 S.Ct. 74 (1927), for the general rule that items not particularly described in a search warrant cannot be seized while executing that warrant. This general rule developed from the Fourth Amendment's requirement that a warrant particularly describe the things to be seized. (A similar requirement is found in N.C.G.S. 15-26.) To be more precise, *Marron* prohibits the seizure of one thing under a warrant describing another, subject to the exception that items not described in the warrant can be seized if they are instrumentalities or fruits of crime, or contraband. Narcotics paraphernalia is within the class of instrumentalities and means by which a crime is committed. *United States v. Bridges*, 419 F. 2d 963 (1969). Thus, it appears that

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the papers and pipe were not inadmissible under *Marron*. However, the traffic citation is merely evidence that defendant resided at 604 Barnes Avenue, and, therefore, it does not fit within any exceptions to the general rule. The State contends that the traffic citation could be seized under the warrant for marijuana because the Court in *Warden v. Hayden*, 387 U.S. 294, 18 L.Ed. 2d 782, 87 S.Ct. 1642 (1967), eliminated the distinction between "mere evidence" and instrumentalities or fruits of crime.

The Court in *Hayden* permitted the seizure of "mere evidence" during a search incident to a "hot pursuit" and arrest, that is, a lawful but warrantless search. It seems proper to hold that *Hayden* also enlarges the scope of permissible seizures to include "mere evidence" when a search is conducted under a warrant. If it were otherwise, a situation would arise in which the police could seize "mere evidence" pursuant to a lawful search without a warrant but not with a warrant. This would be anomalous when one considers the judicial preference for searches pursuant to a warrant. *But see United States v. Dzialak*, 441 F. 2d 212, cert. denied, 404 U.S. 883 (1971). In *Crawford v. State*, 9 Md. App. 624, 267 A. 2d 317 (1970), the Court employed *Hayden* to hold that pawn tickets seized under a search warrant for narcotic drugs and narcotic paraphernalia were admissible as evidence where the police had reason to believe the pawn tickets were incriminating evidence. However, the Court in *Crawford* did not consider *Marron*. We do not believe that the police may, while executing a search warrant, seize an item not mentioned in that warrant merely because it appears to be incriminating. Such an interpretation would appear to vitiate the state and federal constitutional requirements that warrants shall particularly describe the items to be seized at least where the police know beforehand that they are going to seize a particular item not mentioned. In fact, the New York Court of Appeals refused to allow the seizure of a sweater in the course of executing a search warrant for a pistol and referred to *Hayden* as follows:

"If anything, it reinforces the strength and need for the *Marron* holding. *Hayden* did not involve a search warrant, and at no point was *Marron* discussed by the court. Moreover, *Marron* was cited with approval in *Berger v. New York* (388 U.S. 41, 58), decided after *Hayden*" *People v. Baker*, 23 N.Y. 2d 307, 244 N.E. 2d 232 (1968).

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Nevertheless, we feel that the law respecting the seizure of items not described in a search warrant has undergone some change. See, e.g. *State v. Newsom*, 284 N.C. 412, 200 S.E. 2d 617 (1973). Therefore, we address ourselves to the proper test under which items not described in a search warrant may be seized.

[7, 8] In executing a search warrant an officer may seize items not described therein, regardless of whether they constitute instrumentalities or fruits of crime, contraband, or mere evidence, at least where there is a *nexus* between the items to be seized and criminal behavior, and where such items are discovered *inadvertently* by the officer, in *plain view*, in the course of a *proper execution* of the warrant. 68 Am. Jur. 2d, Searches and Seizures, § 113, p. 768 (1973). See also Stansbury, N. C. Evidence, Brandis' Revision, § 121a, p. 372. Also, in *State v. Carey*, 285 N.C. 509, 206 S.E. 2d 222 (1974), the Court upheld the seizure of shotgun shells where the officers were lawfully present under an *arrest warrant* and the shells were observed *inadvertently* in plain view. *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022 (1971), involved an invalid search warrant but the plurality opinion stated:

"If the initial intrusion is bottomed upon a *warrant* that fails to mention a particular object, *though the police know its location and intend to seize it*, then there is a violation of the express constitutional requirement of 'Warrants . . . particularly describing . . . [the] things to be seized.'" (Emphasis added.)

We note the negative inference in the above quote which indicates that an inadvertent discovery of items not mentioned in a warrant does not violate the "particularity requirement." Thus, we hold it is permissible to seize an item, constituting "mere evidence" while *properly* executing a search warrant for another item when (1) there exists a *nexus* between the item to be seized and criminal behavior, and (2) the item is in plain view, and (3) the discovery of that item is *inadvertent*, that is, the police did not know its location beforehand and intend to seize it. In the case at bar, the officers seized the traffic citation in plain view, which they could have reasonably believed would aid in the conviction of defendant, and obviously they discovered it *inadvertently* while lawfully on the premises pursuant to a search warrant. Defendant's fifth assignment of error is overruled.

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[9] In his sixth, seventh, and ninth assignments of error, defendant argues the trial court erred in admitting into evidence statements made by defendant to Officers Fuller and Ray. The trial court correctly ruled on *voir dire* examination that the statements were voluntary and not the result of custodial interrogation. "Volunteered statements are competent evidence, and their admission is not barred under any theory of the law, state or federal." *State v. Hardy*, 17 N.C. App. 169, 193 S.E. 2d 459 (1972).

Defendant's argument in his eighth assignment of error is without merit.

[10] Finally, defendant contends the trial court erred in instructing the jury on possession of marijuana with intent to distribute while not instructing on simple possession of a smaller amount of marijuana. It may be that possession of marijuana is a lesser included offense of possession with intent to distribute. *State v. Aikens*, 22 N.C. App. 310, 206 S.E. 2d 348 (1974), *cert. granted*, 285 N.C. 662, 207 S.E. 2d 763 (1974). However, we find no evidence to support a charge on simple possession of marijuana. "The trial court is not required to charge the jury upon the question of the defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees." 3 Strong, N. C. Index 2d, Criminal Law, § 115, p. 21. The mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice. *State v. Wilson*, 14 N.C. App. 256, 188 S.E. 2d 45 (1972). Defendant's remaining assignments of error have no merit and are overruled.

No error.

Chief Judge BROCK and Judge PARKER concur.

Brown v. Vick

JOHN ROGERS BROWN, SINGLE; HECTOR B. BROWN, SINGLE; AD-DIE BROWN AND WIFE, JANIE BROWN; MARY BROWN DUNHAM AND HUSBAND, PERRY DUNHAM; EVELYN BROWN CORBETT AND HUSBAND, LENHIET CORBETT; SYLVESTER BROWN, SINGLE; ODESSA MAE BROWN, SINGLE; HERBERT COUNCIL, WIDOWER; CARVESTER COUNCIL, SINGLE; LOUVENIA COUNCIL TATUM AND HUSBAND, LEROY TATUM; JAMES W. COUNCIL, SINGLE; AND CHARLES COUNCIL, MINOR, BY HIS GUARDIAN AD LITEM, SYLVESTER BROWN v. HERBERT W. VICK AND ARTHUR L. LANE

No. 7413SC624

(Filed 6 November 1974)

1. Appeal and Error §§ 24, 26— form of exceptions — appeal as exception to judgment

Exceptions not duly noted in the record but appearing only under the purported assignments of error will not be considered; however, the appeal itself is an exception to the judgment and presents for review error appearing on the face of the record.

2. Limitation of Actions § 18— action to set aside deed barred

Plaintiff's claim to set aside a deed allegedly based on fraud was barred by the three year statute of limitations under G.S. 1-52(9).

3. Trusts § 13— purchase at foreclosure — oral agreement — parol trust

Where one person buys land under a parol agreement to do so and to hold it for another until he repays the purchase money, the purchaser becomes a trustee for the party for whom he purchased the land, and equity will enforce such an agreement.

4. Trusts § 19— purchase at foreclosure sale — parol trust negated by conduct of parties

Where plaintiffs did not allege or offer evidence that they attempted to repurchase land bought by defendant at a foreclosure sale and allegedly held by defendant as trustee, and where defendant exercised dominion and control over the property including renting the crop land to plaintiff and his mother, actions and conduct of the parties were inconsistent with the theory that defendant was holding the land in trust for the benefit of the plaintiffs.

APPEAL by plaintiffs from *Braswell, Judge*, 18 March 1974 Session of BLADEN County Superior Court. Argued in the Court of Appeals 17 September 1974.

Plaintiffs allege three claims for relief involving real property in Bladen County. The first claim for relief seeks to set aside a deed prepared by defendant Lane conveying 141 acres of land from Romelia Brown to the defendant Herbert Vick.

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Plaintiffs allege that the name of defendant Vick on this deed as grantee is the result of fraud on the part of defendants. The second claim for relief is based upon the purchase by defendant Vick of 409 acres of land at a foreclosure sale. Plaintiffs seek to impose a trust upon this land arising from the purchase by defendant Vick of the 409 acres pursuant to an agreement by which the plaintiffs would have the right to "redeem" this land within one year after the foreclosure sale. The third claim for relief seeks to recover the rents and profits from the 409 acres which were collected by defendant Vick.

The trial court granted defendants' motion for a summary judgment and plaintiffs appealed.

Earl Whitted, Jr., for plaintiff appellants.

Marion C. George, Jr., for defendant appellee Herbert W. Vick.

Clark, Clark, Shaw & Clark, by Heman R. Clark, for defendant appellees Herbert W. Vick and Arthur L. Lane.

MARTIN, Judge.

[1] The record before us contains a "Grouping of Exceptions and Assignments of Error." None of these assignments of error cites specifically numbered exceptions appearing in the record. Exceptions not duly noted in the record, but appearing only under the purported assignments of error will not be considered. *State v. Barnes*, 18 N.C. App. 263, 196 S.E. 2d 576 (1973); *Midgett v. Midgett*, 5 N.C. App. 74, 168 S.E. 2d 53 (1969); *State v. Wright*, 16 N.C. App. 562, 192 S.E. 2d 655 (1972). However, the appeal itself is an exception to the judgment and presents for review error appearing on the face of the record. *State v. Barnes*, 18 N.C. App. 263, 196 S.E. 2d 576 (1973). Under such circumstances, "[R]eview is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment, and whether the judgment is regular in form and supported by the verdict." 1 Strong, N. C. Index 2d, Appeal and Error, § 26, pp. 153-154.

The trial court made the following pertinent findings and conclusions of law:

"* * *

5. That the undisputed facts in this case are that on March 15, 1967, Romelia Brown went to the office of

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the defendant Lane, . . . accompanied by the plaintiffs, John R. Brown and Hector Brown, her sons. The defendant, Lane, was and is a duly licensed lawyer. In his office a deed was prepared by the defendant, Lane, dated March 15, 1967, conveying the tract of land of approximately 141 acres from Romelia Brown to Vick; that this deed was left in the law office of the defendant, Lane, and was filed for registration in the office of the Register of Deeds of Bladen County on August 29, 1968, and recorded in Book 177, Page 560; that Romelia Brown died intestate October 29, 1970; that at the time of this conveyance, the Romelia Brown property was encumbered with judgments and other liens which were subsequently paid and satisfied by the defendant, Vick;

6. That at the time Romelia Brown and the plaintiffs, John R. Brown and Hector Brown, went to the office of their attorney, Arthur Lane, other land owned by the plaintiffs, John Brown and Hector Brown was under a foreclosure by Giles Clark, Trustee, under a deed of trust, dated January 19, 1963, securing an indebtedness of approximately \$20,000.00; that through their attorney Lane, the plaintiffs contacted the defendant Vick and reached an understanding that the defendant Vick, would bid for the land of John and Hector Brown at the foreclosure sale by Giles Clark, Trustee, and if the defendant Vick became the successful bidder, the title to the Romelia Brown tract, encumbered as it was, would be conveyed to him simultaneously with the purchase from the Trustee, and with the further understanding that the defendant, Vick, would give the plaintiffs the opportunity to repurchase their property from him at any time within a year from his acquisition of the same.
7. That the John and Hector Brown property was duly foreclosed by Giles Clark, Trustee, and sold to the defendant, Vick, who paid the purchase price and received a deed from Giles Clark, Trustee, and the deed from Romelia Brown was delivered to the defendant, Vick;
8. That the defendant, Lane, was attorney for Romelia Brown and the plaintiffs John and Hector Brown at all times during the transactions complained of, and was paid by them and at no time during any of these trans-

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actions did he represent, or receive payment from the defendant Vick.

9. That the deed from Giles Clark, Trustee, to the defendant, Vick, was dated July 17, 1968, and recorded the 20th day of August 1968, in Book 177, Page 475.
10. That following the recording of the deeds to the defendant, Vick, the allotments of tobacco and other crops as established by the ASCS office of Bladen County, for all of the lands conveyed to defendant, Vick, were transferred to the defendant, Vick with the understanding and assistance of the plaintiffs John and Hector Brown, and for the crop year 1970; that Romelia Brown through her son, the plaintiff, John Brown, rented the crop land from all tracts of land involved from the defendant, Vick, for the 1970 crop year; that the defendant, Vick has continuously, since the recording of the deeds aforesaid, rented the farmland and received all of the rents and profits from all of the land in question, and otherwise exercised dominion and control over all of said property;
11. That there is no allegation in the plaintiff's complaint and no evidence from any source that the plaintiffs at any time tendered payment to the defendant, Vick, of the amount which was invested by him in the payment of the liens on the Romelia Brown property and paid by him for the purchase of John and Hector Brown's land at foreclosure by Giles Clark, Trustee, as they were required to do within one year under the express agreement, which the plaintiffs alleged;
12. Based upon the undisputed facts as disclosed by the pleadings, the affidavits and depositions together with the sworn testimony of the plaintiff, John Brown, the Court concludes that as a matter of law:
 1. The plaintiffs' FIRST CLAIM FOR RELIEF based upon allegations of fraud on the part of the defendant, Lane, is barred by the three year statute of limitations as established by North Carolina General Statutes 1-52 (9), for that the statute of limitations was affirmatively plead by the defendants, and the plaintiffs have failed to show that this action was commenced within three years from the discovery of the alleged fraud and the Court finds that the plaintiffs did in fact have knowledge of all of

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the facts and circumstances surrounding the transaction which they allege was fraudulent for more than three years prior to the commencement of this action.

2. That there is no allegation and no evidence of any fraud having been committed, condoned or participated in by the defendant, Vick, on the plaintiffs or any other person and that the plaintiffs' FIRST CLAIM as to defendant, Vick, should be dismissed, and that if any such cause of action ever existed against defendant, Vick, the same would also be barred by the three-year statute of limitation. . . .
 3. That as to the SECOND CLAIM FOR RELIEF, the plaintiffs have failed to allege or offer any evidence that they complied with the express agreement, which the plaintiffs themselves allege to have been made with the defendant, Vick, as to the reconveyance of the property in question, and therefore plaintiffs have no claim upon which relief can be afforded to them in law or in equity, there being no evidence that they at any time offered to pay any sum of money to the defendant, Vick, which according to the plaintiffs' allegations should have been tendered to the defendant, Vick, within one year of the conveyances to him.
 4. That the plaintiffs' SECOND CLAIM FOR RELIEF is likewise barred by the statute of limitations, not having been commenced within three years from the accrual of the cause of action alleged.
 5. That the plaintiffs' THIRD CLAIM FOR RELIEF is a restatement of the plaintiffs' first and second claims for relief wherein plaintiffs seek entitlement to rents and profits, and plaintiffs having failed to prevail therein, their third claim for relief is likewise barred and affords no basis upon which relief can be granted to the plaintiffs.
- * * *
7. That there is no genuine issue of fact.
- * * *
2. The Motion of each of the defendants for Summary Judgment in favor of the defendants as to each claim for relief is allowed."

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[2] The trial court's findings support its conclusion that plaintiffs' first claim to set aside a deed allegedly based on fraud was barred by the three-year statute of limitations under G.S. 1-52(9).

[3, 4] In their second claim for relief, plaintiffs seek to impose a constructive trust upon the 409 acres held by defendant Vick. It is uniformly held to be the law in this State that where one person buys land under a parol agreement to do so and to hold it for another until he repays the purchase money, the purchaser becomes a trustee for the party for whom he purchased the land, and equity will enforce such an agreement. *Hare v. Weil*, 213 N.C. 484, 196 S.E. 869 (1938); *Paul v. Niece*, 244 N.C. 565, 94 S.E. 2d 596 (1956); *Ketner v. Rouzer*, 11 N.C. App. 483, 182 S.E. 2d 21 (1971). "Where purchase has been made at a public or judicial sale, and the purchaser who paid the money out of his own funds agreed to hold the land subject to the right of the person, whose land he bought, and to reconvey the legal title upon repayment of his outlay, it has been held generally in this State that a valid parol trust is created in favor of the former owner of the land." *Hare v. Weil*, *supra*. "To create a parol trust there must be an agreement amounting to an undertaking to act as agent in the purchase and constituting a covenant to stand seized to the use or benefit of another." *Wolfe v. Land Bank*, 219 N.C. 313, 13 S.E. 2d 533 (1941). In the case at bar, the trial court found the undisputed facts to be that the plaintiffs had failed to allege or offer evidence that they complied with the agreement under which plaintiffs were to repurchase the land within one year after the foreclosure sale; that the deed from the trustee, who held a deed of trust on the 409 acres, to defendant Vick was dated 17 July 1968 and was recorded on 20 August 1968; and that since the date of recordation, defendant Vick has collected all the rents and profits and exercised dominion and control over all of this 409 acres of land. Furthermore, the trial court found that the undisputed fact was that Romelia Brown, through her son, the plaintiff John Brown, had rented the crop land from all tracts of land involved from the defendant Vick for the 1970 crop year. This action manifests a clear intention to recognize defendant Vick as landlord and to assume for themselves a role as tenants. Under these circumstances, the actions and conduct of the parties are inconsistent with the theory that defendant Vick was holding the land in trust for the benefit of plaintiffs. Instead, such conduct indicates that defendant Vick was acting as the sole

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legal and equitable owner of the land. Thus, if there ever was a parol trust, the conduct of the parties as reflected in the findings of fact shows an intention not to rely thereon. See *Hare v. Weil, supra*.

Assuming there was a parol trust, the plaintiffs are estopped by their conduct to assert equitable title at this late time. See *Wolfe v. Land Bank, supra*. Furthermore, if a parol trust existed, plaintiffs, by their conduct, have waived their right to enforce it.

"In 65 C.J. 955, it is stated: 'A *cestui que trust*, or one claiming to be such, who is competent to act for himself, may be estopped, or waive his right, to enforce a trust in his favor by words or acts on his part which, expressly or by implication, show an intention to abandon, or not to rely upon or assert, such trust, as by acquiescing, with knowledge of all the material facts, in the alleged trustee's acts in dealing with, or disposing of, the property in a manner inconsistent with the existence or continuation of a trust.'" *Hare v. Weil, supra*, at page 488.

Therefore, the undisputed facts set out by the trial court support its conclusion that plaintiffs should not, as a matter of law, recover on their second claim for relief. For this reason, we find it unnecessary to consider whether the three year or ten year statute of limitation should apply to a constructive trust.

Since plaintiffs have failed in their first and second claims for relief, their third claim for relief was properly dismissed.

Affirmed.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. ARTHUR S. KAPLAN

No. 7415SC565

(Filed 6 November 1974)

1. Criminal Law §§ 80, 91— police files — motion to examine — continuance properly denied

The trial court did not err in denying defendant's motion for continuance based on the refusal of the State to furnish matters

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requested in defendant's motions for a bill of particulars where defendant's request asked for practically the complete files of the investigating officers and all the information obtained by the investigating officers and solicitor's office as the result of their investigation. G.S. 15-143; G.S. 15-155.4.

2. Constitutional Law § 31; Criminal Law § 80— access to evidence — limitation no denial of constitutional rights

Defendant's constitutional rights were not abridged by failure of the trial court to allow defendant an inspection of all papers, documents, and exhibits and examination of any expert witness of the State.

3. Constitutional Law § 30; Narcotics § 1— possession of marijuana with intent to distribute — constitutionality of statute

In a prosecution for possession of marijuana with intent to distribute, the trial court did not err in denying defendant's motion to quash the bill of indictment against him based on defendant's contentions that the statutes under which he was charged create a statutory presumption which violates defendant's constitutional rights and that the N. C. Constitution and the Fourteenth Amendment to the U. S. Constitution forbid the statutory enactment of any legislation criminalizing marijuana.

4. Searches and Seizures § 1— tent in woods — warrant not required for search

Where the evidence showed that a tent in which marijuana was found was not a building within the curtilage nor was the area in which it was found an immediate part of the dwelling site, no search warrant was necessary for officers to search the tent-like structure, and evidence seized therefrom was properly admitted in a prosecution of defendant for possession of marijuana with intent to distribute.

5. Narcotics § 4— marijuana in tent in woods — constructive possession

Evidence was sufficient to show that defendant was in constructive possession of a tent-like structure located in the woods one-eighth of a mile from his house where it tended to show that witnesses observed defendant coming from the house with two bags, going directly to the tent, placing the two bags therein, and returning directly to the house, no one accompanied defendant, and no one else attempted to go to the tent.

APPEAL by defendant from *Gambill, Emergency Judge*, 18 February 1974 Session Superior Court, CHATHAM County. Heard in the Court of Appeals 17 September 1974.

Defendant was charged with possession of marijuana with intent to distribute. The jury found him guilty, and he appealed from judgment entered on the verdict. Facts necessary to decision will be set out in the opinion.

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Attorney General Carson, by Deputy Attorney General Vanore, for the State.

Winston, Coleman, and Bernholz, by Roger B. Bernholz, for defendant appellant.

MORRIS, Judge.

We note at the outset that defendant's brief makes no reference to any exceptions in the record on appeal. For the failure to abide by the rules of appellate procedure, specifically Rule 28, Rules of Practice in the Court of Appeals of North Carolina, defendant's appeal is subject to dismissal upon the grounds that he has abandoned all exceptions. However, we have chosen to decide this case on its merits in view of defendant's notion that the case has grave constitutional import.

[1] Appellant first assigns as error the court's denial of his motion to continue. The motion was bottomed on the refusal of the State to furnish the matters requested in defendant's motions for a bill of particulars under G.S. 15-155.4 and G.S. 15-143. G.S. 15-143 provides that the court may, in its discretion, require the solicitor to furnish defendant with requested information for better preparation of his defense. Defendant's second motion for a bill of particulars was under that statute. He has shown no abuse of discretion nor does the record disclose any. G.S. 15-155.4 provides that the court "*shall for good cause shown, direct the solicitor or other counsel for the State to produce for inspection, examination, copying and testing by the accused or his counsel any specifically identified exhibits to be used in the trial of the case sufficiently in advance of the trial to permit the accused to prepare his defense; . . .*" (Emphasis supplied.) It is significant that defendant does not ask for that which the statute provides, to wit: specifically identified exhibits. The request asked for copies of all reports prepared by police or other agents or employees of the State; statements of witnesses; statements of defendant; names, addresses and occupations of witnesses; copies of any documents signed by defendant; agreement of the solicitor for defendant to examine before the Clerk *any* expert witness to be offered by the State; the delivery to defendant for his examination and testing of the substance confiscated from him alleged to be a controlled substance. The defendant's request asked for practically the complete files of the investigating officers and all the information obtained by the investigating officers and solicitor's office

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as the result of their investigation. We quote Justice Moore, writing for a unanimous Court in *State v. Davis*, 282 N.C. 107, 111, 191 S.E. 2d 664 (1972) :

“ ‘We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.’ *Moore v. Illinois*, 408 U.S. 786, 33 L.Ed. 2d 706, 92 S.Ct. 2562 (1972). Defendant was not entitled to the granting of his motion for a fishing expedition nor to receive the work product of police or State investigators.”

Certainly the court is not required to turn over the seized contraband to defendant and take the chance of not being able to introduce it into evidence at trial because of breaks in the chain of possession or other reasons.

[2] Defendant further contends that he was denied the reasonable opportunity to prepare his defense, that his constitutional right of confrontation was abridged, that he was denied due process all by reason of the denial of his motion for continuance and the failure of the court to direct the solicitor to accede to the requests filed by defendant. In *State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334, cert. denied 377 U.S. 978, 12 L.Ed. 2d 747, 84 S.Ct. 1884 (1964), defendant had made a motion for broad discovery and on appeal had raised questions of denial of constitutional rights. Although *Goldberg* was decided prior to the enactment of G.S. 15-155.4, we think Justice Parker's (later C.J.) statement is applicable to the facts before us:

“In our opinion, and we so hold, defendants here have not shown facts which would have warranted the trial court to enter an order in its discretion or as a matter of right allowing them to inspect the files of the State Bureau of Investigation in these criminal cases pending against them as prayed in their petition, and the denial of their petition does not violate any of their rights under Article I, sections 11 and 17 of the North Carolina Constitution, and under the Fifth, Sixth, Seventh, and Fourteenth Amendments to the United States Constitution.” *State v. Goldberg, supra*, at 192-193.

For an excellent discussion of the underlying objections to giving criminal defendants an unqualified right to an inspection of all papers and documents, if any, in the files of the investigative or prosecutorial officers, see *State v. Tune*, 13 N.J. 203,

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98 A. 2d 881 (1953). Defendant's first assignment of error is overruled.

[3] By his second assignment of error defendant contends that the court erred in denying his motion to quash the bill of indictment for the reason that the indictment charged the defendant with a crime pursuant to statutes which are violative of defendant's constitutional rights to due process of law and the equal protection of the laws. In support of this contention defendant poses two arguments: that the statutes create a statutory presumption which violates defendant's constitutional rights and that the Constitution of North Carolina and the Fourteenth Amendment to the Constitution of the United States forbid the statutory enactment of any legislation criminalizing marijuana. Neither of these positions is well taken. With respect to the first, we reaffirm the position of this Court in *State v. Maggio*, 19 N.C. App. 519, 199 S.E. 2d 138 (1973), and earlier cases cited therein and in *State v. McAuliffe*, 22 N.C. App. 601, 207 S.E. 2d 1 (1974). As to the second, we take defendant's position to mean that because there is debate and disagreement as to whether the use of marijuana is injurious to the user, the State has acted beyond its constitutional power in making its possession and sale illegal. Defendant also argues that he has a fundamental right to make a fool of himself so long as he, by so doing, does not endanger others. It is not our purpose to treat defendant's arguments lightly. However, we see nothing in his position deserving of lengthy treatment. Suffice it to say that all 50 States and the Federal Government make the possession of marijuana illegal. We have no intention of taking the position that they have exceeded their constitutional powers. This assignment of error is overruled.

The third assignment of error is directed to the court's denial of defendant's motion to suppress evidence obtained as the result of a search of defendant's premises.

Evidence with respect to the alleged invalid search was as follows: Officers had the house where defendant lived under surveillance on the night of 8 November 1973. Officer Brown testified that at approximately 10:40 p.m. he saw a person leave from the back side of the residence with a flashlight in his hand and enter the wooded area to the right and rear of the dwelling house. The person himself was lost from witness's sight, but the flashlight beam could be seen in the woods for quite some time. Approximately ten minutes later the person was again seen

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coming nearer the house, and he re-entered the house. Officer Brown stated that a few minutes before he saw the subject leave from the back of the house, he had seen two white males come from the house and step under the balcony area. He recognized one of them at the time. He stated that since he had seen defendant he could state that the other one was Arthur Kaplan, the defendant. He heard the other person say, "I'll probably need more soon," and defendant Kaplan reply: "I'll try to have it for you when you need it. It's good weed." Witness missed the rest of the conversation because he tried to conceal himself better since the two men had turned on several outside lights. Approximately five to ten minutes after the other person left witness saw "a subject I can identify in court as Mr. Kaplan" leave from the balcony area. He was wearing brown boots, corduroy type trousers, and a light colored shirt. Over his right shoulder he was carrying a large dark colored bag and, along with it, a light bag which was smaller. He passed within two feet of the witness. In witness's haste to conceal himself when the lights were turned on, he had lost his hat, and defendant stepped on the hat. After defendant passed by, witness crawled from his location so he could look down the path. He saw defendant turn up the path into a wooded area and lost sight of him. Some five to ten minutes later defendant came back by witness without the bags and went back in the house. Witness left his position and joined Deputy Tripp who was positioned down the pathway in the woods. They proceeded to a location pointed out by Tripp at which was found a polyethylene covering over some boughs draped like a Hogan-type tent. This was at the end of the pathway. In the tent structure were two bags—a dark colored one and a lighter colored one. He closed the flap and laid two sticks across the area and Deputy Tripp put a couple of rocks there so he could identify them.

Officer Tripp testified that he had stationed himself in a wooded area just to the right of a pond which was back of defendant's house. There was a small building "right near" his location which appeared to be a storage building. Officer Tripp observed two subjects come out on the balcony of the house, the area was well lighted, and he could see that one of them was the defendant. The other man left in an automobile, and defendant went back in the house, turned out the lights, and in two or three minutes came back out of the house, down the balcony and down the path described by Agent Brown earlier. He had two bags on his shoulder, a light colored bag and a dark colored

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bag, the light colored one being the smaller of the two. He came across the head of the pond, passed within 15 feet of the witness, came around in front of the building and up an incline where the path continued on up through the woods to the location of the "tent." Witness followed defendant to the location keeping about 100 feet behind him—far enough so he could move and not be heard. Defendant went to the tent and witness got behind a tree to the left of the path. When defendant came back by witness's location he did not have either bag. Witness saw defendant go to the tent but could not positively identify him because of the light.

The two then went and obtained a search warrant and returned. In their search of the house, they found a large marijuana cigarette in the bedroom. In their search of the tent they found the two bags. The larger one contained three brick-like forms which were later determined to be marijuana.

The path was a well-worn pathway which went in a direction from the front of the dwelling, beside the pond area, turned around the pond area and went into the wooded area. The spot where the tent was found was approximately one-eighth of a mile from the dwelling. There was at least four other residences on the same side of the pond as defendant's. The tent was on the other side of the pond and there is another residence on that side of the pond near the dam. The path was not seen beyond the tent. Nor does it go all around the pond.

[4] Defendant urges that the officers conducted a warrantless search when they first opened the tent and saw the bags and that the obtaining of a search warrant did not make legal a search he contends was illegal. We do not agree that there was an illegal search—i.e., a search without a warrant where a warrant was necessary. In *State v. Harrison*, 239 N.C. 659, 80 S.E. 2d 481 (1954), at page 662, Justice Denny (later C.J.) said:

"It seems to be generally held that the constitutional guaranties of freedom from unreasonable search and seizure, applicable to one's home, refer to his dwelling and other buildings within the curtilage but do not apply to open fields, orchards, or other lands not an immediate part of the dwelling site. Machen, *The Law of Search and Seizure*, page 95 (citing *Hester v. United States*, 265 U.S. 57, 44 Sup. Ct. 445, 68 L.Ed. 898); Cornelius, *Search and Seizure*, Second Edition, page 49; 48 C.J.S., Intoxicating Liquors,

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section 394, page 630, et seq.; 30 Am. Jur., Intoxicating Liquors, section 528, page 529; Anno. 74 A.L.R. 1454, where numerous cases on this point are collected, among them being: *Simmons v. Commonwealth*, 210 Ky. 33, 275 S.W. 369; *S. v. Cobb*, 309 Mo. 89, 273 S.W. 736; *Penney v. State*, 35 Okla. Crim. Rep. 151, 249 P. 167; *Sheffield v. State*, 118 Tex. Crim. Rep. 329, 37 S.W. 2d 1038; *Field v. State*, 108 Tex. Crim. Rep. 112, 299 S.W. 258. So, if it be conceded that the gallon of nontax-paid liquor involved in the present case was found near the premises of the defendant but actually on the land of another and not within the curtilage of the dwelling of the owner thereof, a search warrant was not necessary for its seizure and the admissibility of evidence with respect thereto." Quoted with approval in *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972).

[5] We think the evidence clearly shows that the tent was not a "building within the curtilage" nor was the area in which it was found "an immediate part of the dwelling site." See *Hester v. United States*, 265 U.S. 57, 68 L.Ed. 898, 44 S.Ct. 445 (1924). No search warrant was necessary for the officers to search the tent-like structure. There was plenary evidence that the structure was in the constructive possession of defendant. Witnesses identified him as coming from the house, with two bags, going directly to the tent, placing the two bags therein and returning directly to the house. No one was with him nor did anyone else attempt to go to the tent. We hold that no search warrant was required for the search—the first or second time—and the evidence obtained was clearly admissible.

By assignment of error No. 3 defendant contends that the State failed to establish the legality of the search by producing a valid search warrant. Our holding that the officers did not need a search warrant to conduct a legal and reasonable search of the tent makes this assignment of error moot.

Defendant had a fair trial free from prejudicial error and was represented by competent counsel.

No error.

Chief Judge BROCK and Judge MARTIN concur.

Fleming v. Mann

WESLEY S. FLEMING v. FLORA O. MANN, REGISTER OF DEEDS
OF GRANVILLE COUNTY, NORTH CAROLINA, AND MARY G.
CHACE

No. 749SC692

(Filed 6 November 1974)

1. Mandamus § 1—mandamus statutes repealed—mandatory injunction

Although the statutory authority for the special remedy of mandamus by civil action, formerly G.S. 1-511 *et seq.*, has been repealed, the remedy formerly provided by the writ of mandamus is still available through the equitable remedy of mandatory injunction.

2. Registers of Deeds; Registration § 1— letters and affidavit pertaining to real property—registration

Letters addressed to plaintiff pertaining to a boundary dispute and an affidavit outlining the boundary dispute were not clearly excluded from the category of "instruments pertaining to real property" which are allowed to be recorded by the register of deeds; therefore, plaintiff was not entitled to a writ of mandamus requiring the register of deeds to expunge them from her records. G.S. 47-1.

3. Registers of Deeds— no duty to inquire into substance of documents

It is not the function of the register of deeds to inquire into the substance or the legal efficacy of the documents presented to him for recording; if they are properly acknowledged and probated and if the appropriate fee is tendered, it is his duty promptly to record and index them.

4. Registration § 3— unauthorized recorded document— no constructive notice

An unauthorized recorded document simply gives no constructive notice of its contents.

5. Courts § 9— dismissal denied by one judge— allowance by another judge

In an action for mandamus to require the register of deeds to expunge certain documents from her records, a superior court judge had authority to grant defendants' Rule 12(b)(6) motion to dismiss although another judge had denied the same motion where additional documents were recorded and plaintiff's complaint was supplemented following the initial ruling.

6. Rules of Civil Procedure § 12— motion to dismiss— inadvertent omission of one defendant's name— oral motion to include name

Where the trial court found that the name of one defendant was inadvertently omitted from a written Rule 12(b)(6) motion to dismiss, the court had the discretion to allow an oral motion that such defendant's name be included in the motion to dismiss.

APPEAL by plaintiff from *Bailey, Judge*, 16 April 1974 Session of Superior Court held in GRANVILLE County.

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Plaintiff and defendant Mary G. Chace share a common boundary between their respective tracts in Granville County. This action stems from a dispute over the location of that line.

On 26 October 1972 and 5 January 1973 Chace acknowledged and presented for recordation to the Register of Deeds of Granville County two "letters," dated respectively 26 October 1972 and 2 January 1973, addressed to plaintiff. The purported purpose of the first of these was "to notify" plaintiff of the boundary line dispute. The second "letter" included Chace's interpretation of the recent history of the title to the land forming the boundary and contains a statement that it was being filed "to avoid any complications or difficulties with innocent third parties." Both "letters" were recorded by defendant Flora O. Mann, Register of Deeds of Granville County. A third "letter," dated 18 June 1973, purportedly "cancelling" the 2 January 1973 letter, was also recorded.

Plaintiff instituted this action 7 September 1973 seeking a writ of mandamus ordering Mann to expunge these documents from the records in her office. Both defendants moved to dismiss pursuant to Rule 12(b) (6). These motions were denied 3 December 1973 by Judge D. M. McLelland.

On 8 January 1974 two additional writings signed and acknowledged by Chace were recorded by Mann. The first purported to "revoke and cancel" the 26 October 1972 letter, and the second, which was entitled "Affidavit of Mary Green Chace Regarding Title Dispute Between the B. E. Green Heirs and Wesley S. Fleming as to Lines Between Their Adjoining Pieces of Real Property in Granville County," outlined a history of the boundary dispute with plaintiff. On 31 January 1974 plaintiff moved under Rule 15(d) and received permission of court to supplement his original complaint to ask for a writ of mandamus ordering Mann also to expunge these additional documents from the records.

On 4 March 1974 attorneys for defendant Chace filed a new motion to dismiss pursuant to Rule 12(b) (6) and subsequently the court allowed defendant Mann's oral motion to be included as a movant in this new motion to dismiss. On 4 April 1974 plaintiff moved for summary judgment pursuant to Rule 56(a).

Plaintiff's motion for summary judgment and defendants' motion to dismiss were heard by Judge James H. Pou Bailey.

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Judge Bailey denied plaintiff's motion, allowed defendants' motion, and by judgment dated 16 April 1974 dismissed plaintiff's action. From this judgment, plaintiff appealed.

Hugh M. Currin and James E. Cross, Jr. for plaintiff appellant.

Watkins, Edmundson & Wilkinson by William T. Watkins and C. W. Wilkinson, Jr. for defendant appellee Flora O. Mann.

Edwards & Manson by Daniel K. Edwards for defendant appellee Mary G. Chace.

PARKER, Judge.

[1] Plaintiff has prayed for no especial relief against defendant Chace, and the only relief prayed for against defendant Register of Deeds is for a writ of mandamus requiring her to expunge from the records in her office certain instruments recorded therein. The statutory authority for the special remedy of mandamus by civil action, formerly found in G.S. 1-511 et seq., was repealed effective 1 January 1970, the effective date of our new Rules of Civil Procedure. Sec. 4, Ch. 954, 1967 Session Laws. "However, in this State, where the court exercises both legal and equitable jurisdiction, in a suit against a public official or board there is no practical difference in the results to be obtained by the common-law remedy of mandamus and the equitable remedy of mandatory injunction." *Sutton v. Figgatt*, 280 N.C. 89, 185 S.E. 2d 97 (1971). Therefore, the remedy formerly provided by the writ of mandamus is still available, albeit the terminology may have changed, and the substantive grounds for granting the remedy as developed under our former practice still control. 2 McIntosh, N. C. Practice and Procedure, 2d Ed., § 2445 (Phillips, 1970 Pocket Parts).

"The writ of mandamus is an order from a court of competent jurisdiction to a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law." *Sutton v. Figgatt, supra*. "It will lie only against a party under present legal obligation to perform the act sought to be enforced, and only at the instance of a party having a clear legal right to demand performance, and then only when there is no other adequate remedy available." 5 Strong, N. C. Index 2d, Mandamus, § 1, p. 291. Applying these principles to the case now before us, we find clear statutory duty imposed upon the Register of Deeds to record instruments prop-

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erly presented to him for recording, but we find no similar duty imposed by statute to expunge any instrument from the records in his office. Plaintiff contends that such a duty must be found in the present case because, so plaintiff argues, the documents here in question were not such as the law authorized to be recorded and therefore the Register of Deeds was duty bound to expunge them. We do not agree.

[2] The principal duties of the Register of Deeds are set forth in G.S. Chap. 161, Art. 2. Section 161-14(a) of that Article contains the clear mandate that "[t]he register of deeds shall immediately register all written instruments presented to him for registration," and there is little in other pertinent statutes to limit the all-inclusive scope of the words "all written instruments." G.S. 161-22 refers to "instruments of writing required or authorized to be registered" and G.S. 47-14(a) refers to "any instrument, required or permitted by law to be registered," but neither statute lists what instruments these may be. The Connor Act, G.S. 47-18, and the statute relating to deeds of gift, G.S. 47-26, provide that the instruments to which they apply must be registered in order to be fully valid. In that sense such instruments are "required" by law to be registered. Since any instrument required by law to be registered must of necessity be included in the category of instruments "authorized" or "permitted" by law to be registered, the latter category is much broader. G.S. 47-1, which deals with acknowledgment and probate, provides an extensive list of documents to which that section applies, including "affidavits concerning land titles or family history, any instruments pertaining to real property, and any and all instruments and writings of whatever nature and kind which are required or allowed by law to be registered in the office of the register of deeds." From that section, it is clear that "affidavits concerning land titles or family history" and "any instruments pertaining to real property" are included among the documents "allowed by law to be registered." It may be legitimately argued that all of the documents involved in the present case are "instruments pertaining to real property" and as such are included among those documents which are "allowed" or "authorized" or "permitted" by law to be registered. However that may be, it is certain that they were not so clearly excluded from that category that, once registered, the plaintiff had a clear legal right to require the Register of Deeds to expunge them. Absent such a clear legal right, plaintiff's action for writ of mandamus cannot be sustained.

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[3, 4] Moreover, we point out that it is not the function of the Register of Deeds to inquire into the substance or the legal efficacy of the documents presented to him for recording. If they are properly acknowledged and probated and if the appropriate fee is tendered, it is his duty promptly to record and index them. The purposes of our recording statutes would be ill served if it were otherwise. Should it turn out in some case that the Register of Deeds recorded a document not "required or authorized" to be registered, that should be no concern of his. An unauthorized recorded document simply gives no constructive notice of its contents. *Chandler v. Cameron*, 229 N.C. 62, 47 S.E. 2d 528 (1948).

Since mandamus will not lie, it remains for us to examine whether plaintiff's complaint can be sustained on any other basis. As previously noted, the only relief which plaintiff prayed for was issuance of the writ of mandamus. However, except in case of judgment entered by default, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." G.S. 1A-1, Rule 54(c). Therefore, if the allegations in plaintiff's complaint are sufficient to show that he may be entitled to any relief in this action, even though not that which he requested, defendants' motion to dismiss should not have been granted. We have carefully examined plaintiff's complaint and find no grounds for granting relief. Although plaintiff alleged in his complaint that the three "letters" which defendant Chace had written and filed for recording had "created a cloud on the title of the plaintiff's said lands," none of the instruments of which plaintiff complains question the validity of or impose any encumbrances on his title. At most they express defendant Chace's question as to the correct location of the boundary line and express her desire to have the matter settled by a survey. If plaintiff obtained the full relief which he seeks, nothing would be settled thereby, as the correct location of the boundary line would remain in dispute. Plaintiff's remedy is by special proceeding under G.S., Chap. 38, not by civil action to quiet title or to expunge recorded instruments from the records.

[5] Plaintiff's contention that Judge Bailey lacked authority to grant defendants' Rule 12(b) (6) motion to dismiss because Judge McLelland had previously denied the same motion is without merit. Following Judge McLelland's ruling, additional

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documents were recorded and plaintiff's complaint was supplemented. Judge Bailey was not passing upon the precise question which had previously been presented to Judge McLelland.

[6] Finally, plaintiff contends that appellee Mann's oral motion to dismiss should have been disallowed because of her failure to state the number of the Rule of Civil Procedure under which she was moving. Both Chace and Mann were represented at the hearing on the motion by the same attorney. The name of Mann was omitted from the written motion filed 4 March 1974 to dismiss under Rule 12(b)(6). Judge Bailey found that this omission was inadvertent and allowed on oral motion Mann's name to be included in the motion to dismiss. This procedure was within the discretionary power of the trial court.

The judgment appealed from is

Affirmed.

Judges CAMPBELL and VAUGHN concur.

C. CAPERS SMITH v. STATE OF NORTH CAROLINA; JAMES E. HOLSHOUSER, GOVERNOR; JOE K. BYRD, CHAIRMAN, STATE BOARD OF MENTAL HEALTH; RALPH SCOTT, ADVISORY BUDGET COMMISSION; DAVID T. FLAHERTY, SECRETARY OF HUMAN RESOURCES; N. P. ZARZAR, COMMISSIONER, MENTAL HEALTH; TREVOR G. WILLIAMS, SUPERINTENDENT, BROUGHTON HOSPITAL

No. 7425SC181

(Filed 6 November 1974)

1. State § 4— action against State — immunity impliedly waived

By entering into a statutorily authorized contract of employment for a specific term of years, the State impliedly waived its immunity from suit for a breach thereof. G.S. 122-25.

2. Venue § 4— action against State — action arising in Burke County — no change of venue

Plaintiff's cause of action for damages for breach of an employment contract arose in Burke County where both a controversy over tape recordings took place and plaintiff's allegedly unjustified dismissal was effected, and the mere fact that plaintiff's discharge was thereafter affirmed by various State officials based in Raleigh does not entitle appellants, as a matter of right, to a change of venue to Wake County. G.S. 1-77.

Judge BAILEY dissenting.

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ON *Certiorari* to review order of *Ervin, Judge*, 20 October 1973 Session of Superior Court held in BURKE County.

By complaint filed 24 July 1973, plaintiff, C. Capers Smith, alleged that on or about 1 October 1970 Robert Scott, then Governor of North Carolina, appointed him to a six-year term as Superintendent of Broughton Hospital, a State owned and controlled institution located in Morganton, N. C.; that plaintiff accepted the appointment, entered into the employment, and thereafter performed "all of the duties and responsibilities pertaining thereto, properly, efficiently and according to the contract"; that on or about 18 April 1973, "a controversy arose as to whether or not two tape recorder cassettes, which allegedly were made during an official Credentials Committee meeting called by the Superintendent-plaintiff at Broughton Hospital, should or could be released to an agent of the Secretary of the Department of Human Resources"; that, at the time of such demand, the tapes were not in the possession of plaintiff and therefore could not be released by him to said agent for the Secretary; that, because of plaintiff's failure to release the tapes to Dr. Trevor Williams, the Western Regional Commissioner of Mental Health for the State of North Carolina, "the plaintiff was released from his duties and summarily fired from his position as Superintendent of Broughton Hospital"; that shortly thereafter, Dr. N. P. Zarzar, State Commissioner of Mental Health and the immediate supervisor of Dr. Williams, "affirmed the discharge of the plaintiff and subsequently thereto the same was confirmed by telegram from David T. Flaherty, Secretary of the Department of Human Resources"; that thereafter, "the plaintiff is informed and believes . . . that James E. Holshouser, Governor, approved the action previously taken by Dr. Trevor Williams, Dr. N. P. Zarzar and David T. Flaherty, all of said action being taken without due cause or authority" contrary to statute, without any hearing and without due process; that "thereafter a Claim was made by the plaintiff through counsel as provided in N.C.G.S. 122-1.1 by serving upon the Governor and the then Chairman of the Advisory Budget Commission [Ralph Scott] a Claim for severance pay [but] no response was received from any of the parties named in said Claim"; that at the time of his discharge, plaintiff had three years and five months remaining on his six-year employment contract; that "the method used for his release was not only unjustified and without legal authority, but without due cause, and was also done in a manner of harassment, embarrassment, with widely

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publicized news coverage and under such circumstances as were designed to embarrass and humiliate said plaintiff, and did thereby deprive him of his livelihood and right to his employment . . . [and] did result in [his] professional defamation"; that, "as a result of the illegal, improper and embarrassing discharge as hereinabove set forth, the plaintiff has been deprived of his salary, as well as other fringe benefits due and to become due, from the State of North Carolina"; and "that, at his age and physical condition, it will be impossible or practically impossible for him to obtain other employment of a comparable nature and is therefore a discrimination against this plaintiff due to age and limited physical ability." Plaintiff then prayed that he recover from the defendants "jointly and severally" \$250,000.00 compensatory damages resulting from the above alleged acts.

By motions filed 21 August 1973, defendants State of North Carolina, Holshouser, Scott, Flaherty, Zarzar and Williams (1) moved under Rule 12(b) to dismiss plaintiff's action on grounds that sovereign immunity barred plaintiff's suit and (2) moved for change of venue from Burke to Wake County. Following defendant Chairman of the State Board of Mental Health Joe K. Byrd's answer and "responses" in opposition to both motions, the trial court, by order dated 20 October 1973, denied the same. Defendants-movants excepted and successfully petitioned this Court for writ of certiorari to review the trial court's rulings.

Hatcher, Sitton & Powell by Claude S. Sitton, and James J. Booker for plaintiff appellee.

Blanchard, Tucker, Denson & Cline by Charles F. Blanchard for defendant appellee Byrd.

Attorney General Robert Morgan by Assistant Attorney General William F. O'Connell and Assistant Attorney General Parks H. Icenhour for defendant appellants.

PARKER, Judge.

THE MOTION TO DISMISS

Appellants assign error in the trial court's denial of their motion to dismiss on grounds that sovereign immunity barred plaintiff's suit. As a preliminary, we must determine the nature of plaintiff's actions insofar as it relates to the State of North

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Carolina and the other defendants in their official capacity. In this respect, plaintiff's action is clearly based on contract. Plaintiff has alleged (1) his proper appointment in 1970 to a six-year term as Superintendent of Broughton Hospital, an employment contract authorized by former G.S. 122-25 (later amended, effective 22 May 1973, in 1973 Session Laws, c. 673, s. 2, and repealed, effective 1 July 1973, by Sec. 133 of Ch. 476 of the 1973 Session Laws, "An Act to Further Effectuate the Reorganization of State Government"); (2) his acceptance of the position, satisfactory performance of its attendant duties, and his dismissal without just cause; and (3) his damages resulting from defendants' breach thereof.

[1] In support of their position that sovereign immunity bars plaintiff's action, appellants, noting that the sovereign cannot be sued in its own courts or elsewhere without its consent, *Electric Co. v. Turner*, 275 N.C. 493, 168 S.E. 2d 385 (1969), argue that no such consent has been given in the instant case. We disagree. We hold that by entering into a statutorily authorized contract of employment for a specific term of years, the State in this case has waived its immunity from suit for a breach thereof. To hold otherwise would attribute to the Legislature an intent to authorize the State's entry into a curious sort of contract, one binding upon the other party but not upon the State. While we rest our decision here upon the somewhat narrow grounds that in this case the express statutory authorization to contract for a specific term of years included by logical implication a waiver of sovereign immunity from a suit for breach of a contract made pursuant to that statutory authorization, we note and commend the trend of recent decisions from other jurisdictions against enforcement of the doctrine of governmental immunity. A truly democratic government should be required to observe the same rules of conduct that it requires of its citizens. Some of the decisions adopting this view are: *Kersten Co., Inc. v. Department of Social Services*, 207 N.W. 2d 117 (Iowa 1973), overruling *Megee v. Barnes*, 160 N.W. 2d 815 (Iowa 1968); *V. S. DiCarlo Construction Co., Inc. v. State*, 485 S.W. 2d 52 (Mo. 1972); *George & Lynch, Inc. v. State*, 197 A. 2d 734 (Del. 1964); *Meens v. Board of Educa.*, 127 Mont. 515, 267 P. 2d 981 (1954); and *Regents of University System v. Blanton*, 49 Ga. App. 602, 176 S.E. 673 (1934).

Nor is our decision here inhibited by decisions in our own jurisdiction. Cases cited by appellants are distinguishable. *Elec-*

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tric Co. v. Turner, *supra*, involved a suit for mandatory injunction to control the manner of exercise of discretionary duties of public officials; in the case at bar plaintiff merely seeks monetary damages resulting from the State's alleged breach of contract. In *Construction Co. v. Dept. of Administration*, 3 N.C. App. 551, 165 S.E. 2d 338 (1969), this Court held that plaintiff's suit was not authorized by statute, while in the instant case legislative authority to maintain this suit stems from the fact that plaintiff's contract was itself expressly authorized by statute, G.S. 122-25. *Orange County v. Heath*, 282 N.C. 292, 192 S.E. 2d 308 (1972) concerned an attempt to hold a county liable for damages resulting from an improvidently issued restraining order obtained by the county to enforce a zoning ordinance. A similar factual situation also distinguishes *Town of Hillsborough v. Smith*, 10 N.C. App. 70, 178 S.E. 2d 18 (1970). *Mial v. Ellington*, 134 N.C. 131, 46 S.E. 961 (1903) held that a public office is not private property and that the Legislature has power to abolish offices created by it; in the present case the position which plaintiff held was not abolished when his cause of action arose.

THE MOTION FOR CHANGE OF VENUE

[2] As their second assignment of error, appellants contend that the trial court erred in denying their motion for change of venue from Burke to Wake County. G.S. 1-77 provides, in pertinent part:

“§ 1-77. WHERE CAUSE OF ACTION AROSE.—Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial, in the cases provided by law:

* * * * *

“(2) Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does anything touching the duties of such officer.”

In applying this portion of G.S. 1-77, the Court must determine, *inter alia*, where the cause of action arises, *Coats v. Hospital*, 264 N.C. 332, 141 S.E. 2d 490 (1965). In the case at bar, it is clear that plaintiff's cause of action arose in Burke County

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where both the controversy over the tape recordings took place and plaintiff's allegedly unjustified dismissal was effected. The mere fact that plaintiff's discharge was thereafter affirmed by various State officials based in Raleigh does not entitle appellants, as a matter of right, for a change of venue to Wake County under the statute.

The rulings of the trial court are

Affirmed.

Chief Judge BROCK concurs.

Judge BALEY dissents.

Judge BALEY dissenting.

Plaintiff has brought an action against the State. Any waiver of the State's immunity from suit must be by "plain, unmistakable mandate" of the Legislature and cannot be by implication or construction. *Orange County v. Heath*, 282 N.C. 292, 296, 192 S.E. 2d 308, 310; *State ex rel. State Bd. of Public Affairs v. Principal Funding Corp.*, 519 P. 2d 503 (Okla. 1974). There being no clear waiver of immunity in the statute authorizing his employment, it follows that plaintiff cannot maintain this action. The order of the trial court denying defendant's motion to dismiss should be reversed.

IN THE MATTER OF THE WILL OF LAWRENCE ADOLPH MUCCI,
DECEASED

No. 7428SC734

(Filed 6 November 1974)

Wills § 6—letter sent to attorney—codicil—jury question

In this caveat proceeding, there was sufficient evidence for submission to the jury of an issue as to whether a handwritten letter sent by testator to the attorney who had prepared his will, in which testator stated that he wished his present wife to have the right of residing at a certain address until her death, was intended by testator to serve as a codicil to his will.

Judge BRITT concurring.

Judge BALEY concurs in Judge BRITT's opinion.

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APPEAL by propounder from *Winner, Judge*, 4 March 1974 Session of Superior Court held in BUNCOMBE County. Heard in the Court of Appeals on 26 September 1974.

This is a proceeding to caveat a paper writing dated 25 September 1971 purporting to be a holographic codicil to the last will and testament of Dr. Lawrence A. Mucci dated 25 June 1971, which was probated in common form at the same time as was the will.

The paper writing attacked by this caveat, admittedly in the handwriting of and signed by Lawrence A. Mucci, is as follows:

"LAWRENCE A. MUCCI, M. D.
4 SPRINGSIDE PARK
ASHEVILLE, N. C. 28803

9-25-71

Atty. George H. Johnson
1 Springside Pk.
Asheville, N. C. 28803

Dear George;

Please note that on my death I want my present wife Mary Elizabeth (Illegible) Mucci to have the right of residing at 4 Springside Park until her death. Also note that the expense of upkeep and care of said residence will rest with the estate if her share of my estate is insufficient for this purpose.

Sincerely Yours

LAWRENCE A. MUCCI"

The caveators alleged "[t]hat the paper writing of September 25, 1971 is not the Last Will and Testament of Lawrence Adolph Mucci for the reason that said Testator had executed a Last Will and Testament dated June 25, 1971, which is attached hereto marked 'Exhibit A', and that said paper writing of September 25, 1971 which is attached hereto marked 'Exhibit B' is merely a letter of instruction from said decedent to his attorney, George H. Johnson, Jr., and contains no testamentary intent or language of revocation with reference to his Last Will and Testament of June 25, 1971."

At the trial in the superior court, George Johnson, the executor of the estate, testified that he is an attorney and that

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he resides at 1 Springside Park, Asheville, N. C. He was a neighbor and personal friend to Dr. Mucci. He drafted the will of Dr. Mucci dated 25 June 1971, and Dr. Mucci executed this will in Johnson's presence and in the presence of other witnesses at Johnson's home on 25 June 1971. Mr. Johnson received the letter dated 25 September 1971 by mail at his home. He took the letter to his office and filed it with Dr. Mucci's will. Prior to receipt of the letter Johnson had not had any communications with Dr. Mucci concerning either the letter or the material contained in the letter. Upon receipt of the letter Johnson told Dr. Mucci that he thought they should formalize the codicil by having it typed and witnessed in the same formal manner as the will. Dr. Mucci told Johnson to "go ahead and draw it up." Approximately three working days later Johnson told Dr. Mucci, who was taking his evening walk past Johnson's house, that he had prepared the codicil. Dr. Mucci went inside Johnson's house, read the codicil, and said: "This is what I want; I have to get witnesses for it; I'll be in touch with you later." About a month later Johnson again contacted Dr. Mucci with respect to the codicil he had prepared. He told Dr. Mucci that he was wearing it out by carrying it back and forth from his office to his house and asked Dr. Mucci to get his witnesses and sign the codicil. Dr. Mucci replied, "I'm not quite ready to do that yet. I'll let you know." From that time, late October 1971, until 7 October 1972, when Dr. Mucci died, Dr. Mucci did not contact Johnson again about the codicil. At no time did Dr. Mucci ever ask Johnson to return the letter dated 25 September 1971 or ask Johnson to destroy it. He never asked Johnson where the letter was and Johnson never told him that it had been placed with his will.

At the close of the propounder's evidence, the trial court directed a verdict for the caveators. The propounder appealed.

G. Edison Hill for propounder, George H. Johnson, Jr.

Morris, Golding, Blue and Phillips by James F. Blue III for Mary E. Mucci, party aligned with propounder.

Richard B. Ford for caveators.

HEDRICK, Judge.

Since the letter dated 25 September 1971 was admittedly in the handwriting of and signed by Dr. Mucci, our primary

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concern on this appeal is whether the letter was intended by Dr. Mucci to be a testamentary disposition of his property.

"The distinguishing feature of all genuine testamentary instruments, whatever their form, is that the paper-writing must appear to be written *animo testandi*.

It is essential that it should appear from the character of the instrument, and the circumstances under which it is made, that the testator intended it should operate as his will, or as a codicil to it." *Spencer v. Spencer*, 163 N.C. 83, 88, 79 S.E. 291, 293 (1913).

Whether the requisite testamentary intent is present must be determined not only from a consideration of the language in the paper itself but from a consideration of the facts and circumstances attendant to its preparation and either the manner of its deposit among the valuable papers of the author or its delivery to a third party for safekeeping. *In re Will of Gilkey*, 256 N.C. 415, 124 S.E. 2d 155 (1962); *Rountree v. Rountree*, 213 N.C. 252, 195 S.E. 784 (1938); *In re Southerland*, 188 N.C. 325, 124 S.E. 632 (1924); *In re Bennett*, 180 N.C. 5, 103 S.E. 917 (1920); *Spencer v. Spencer*, *supra*.

We are cited by propounder to *In re Will of Ledford*, 176 N.C. 610, 97 S.E. 482 (1918) and *Rountree v. Rountree*, *supra*, in support of his contention that a letter wholly in the handwriting of and signed by its author may be probated as a valid will. Suffice it to say that the language contained in the letters in each of the cited cases expressed the writer's testamentary intent more explicitly than the letter in the present case, but a more distinguishing feature is to be found in the cited cases in that in each case the letter was deposited by its author in a safe with other valuable papers and found there after his death.

In *In re Will of Gilkey*, *supra* at 420, 124 S.E. 2d at 158, addressing himself to G.S. 31-3.4(a) (3), as it relates to a holographic will being found among the valuable papers of the testator and the will being deposited with a third party for safekeeping, Justice Rodman wrote:

"The requirement that the writing be found after death among testatrix's valuable papers was to show the author's evaluation of the document, important because lodged with important documents, to become effective upon death because left there by the author, thereby establishing the necessary *animus testandi*.

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If the document had been placed among the author's valuable papers without her knowledge and consent, it would of course have no validity as a will even though found among the papers after the author's death."

Thus, if Dr. Mucci had addressed the letter to Mr. Johnson and had deposited it himself among his valuable papers and it had been found there after his death or if he had sent the letter to Mr. Johnson with instructions for its safekeeping, propounder's contention would be more tenable. In our opinion, the total absence of any evidence in the letter or otherwise that Dr. Mucci sent the letter to his attorney with any directions or instructions for its safekeeping, coupled with evidence that he repeatedly refused to execute a formal codicil prepared by Mr. Johnson after he wrote the letter in question, negates any suggestion that he intended that it operate as a codicil to his will. *In re Bennett, supra*. The letter and all of the evidence of the facts and circumstances attendant to its preparation and delivery to Mr. Johnson and its deposit by him in his office with the will points unerringly to the conclusion that Dr. Mucci did not intend that it operate as a codicil to his will; and a peremptory instruction to the jury on the issues raised by the caveat was necessary. *In re Will of Simmons*, 268 N.C. 278, 150 S.E. 2d 439 (1966); *In re Will of Roberts*, 251 N.C. 708, 112 S.E. 2d 505 (1960); *In re Bennett, supra*.

Propounder also contends the court erred in directing a verdict for the caveators. In *In re Will of Redding*, 216 N.C. 497, 498, 5 S.E. 2d 544, 545 (1939), we find the following cogent statement:

"The proceedings to caveat a will are *in rem* without regard to particular persons, and must proceed to judgment, and motions as of nonsuit, or requests for direction of a verdict on the issues, will be disallowed. *In re Will of Hinton*, 180 N.C., 206; *In re Will of Westfeldt*, 188 N.C., 702."

See also *Surety Co. v. Casualty Co.*, 11 N.C. App. 490, 181 S.E. 2d 727 (1971) and *In re Will of Hodgins*, 10 N.C. App. 492, 179 S.E. 2d 126 (1971). Thus, it was error for the court in the present case to direct a verdict for the caveators and the proceeding must be remanded to the superior court for a new trial in accordance with this opinion.

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Reversed and remanded.

Judge BRITT concurring.

While I concur in Judge Hendrick's opinion that the trial court erred in directing a verdict for the caveators, and that the cause should be remanded for a jury to answer the issue of *devisavit vel non* with respect to the alleged codicil, I do not agree that caveators are entitled to a peremptory instruction on the issue.

Without restating all of the facts set out in the opinion, the evidence disclosed that Dr. Mucci, the testator, and Attorney Johnson were neighbors and close friends; that in June of 1971 Attorney Johnson prepared a will for Dr. Mucci who duly executed the will and left it with Attorney Johnson for safekeeping; that Attorney Johnson was named executor in the will; that on 25 September 1971, Dr. Mucci wrote in longhand and mailed to Attorney Johnson the letter alleged to be a codicil; and that Attorney Johnson filed the letter with the original will. I think the evidence was sufficient to raise an inference that Dr. Mucci intended for the letter to serve as a codicil to his will and to place it with Attorney Johnson for safekeeping.

It is true that there was evidence tending to show that Dr. Mucci did not intend that the letter should serve as a codicil to his will, but a resolution of the issue is for the jury rather than the court.

In their brief, caveators argue that under the new Rules of Civil Procedure a directed verdict is permissible in an appropriate caveat proceeding; that the rule in *Redding*, stated in Judge Hedrick's opinion, has been superseded by G.S. 1A-1, Rule 50. Since a valid jury question is raised by the evidence in this case, I hold that we do not reach the question of whether Rule 50 supersedes the rule stated in *Redding*.

I vote to reverse the judgment appealed from, and to remand this cause to the superior court for jury trial of the issue of *devisavit vel non* upon appropriate instructions consistent with this opinion.

Judge BAILEY concurs in Judge BRITT's opinion.

Sutherland v. Hickory Nut Corp.

ADDIE B. SUTHERLAND v. HICKORY NUT CORPORATION

No. 7429SC695

(Filed 6 November 1974)

1. Waters and Watercourses § 1— lower land — dirt and rocks carried by surface water

While a lower landowner is required to receive surface waters from higher lands when they flow naturally therefrom, he is not required to receive from the the higher land dirt and rocks which have been piled thereon by the upper landowner and which, in the natural condition of the lands, would not be carried by the normal flow of surface waters from the upper to the lower tracts.

2. Waters and Watercourses § 1— change in topography by upper landowner — mud taken to lower land — sufficiency of findings

Evidence was sufficient to support findings of fact by the trial court that defendant changed the natural drainage of land by cutting a road into the mountain and piling the excess mud and dirt on the downhill side of the road, and that this alteration of the topography of the land caused mud and silt to be washed by surface waters in a manner different than had naturally existed prior to that time.

APPEAL by defendant from *Martin (Harry C.)*, Judge, May 1974 Session of RUTHERFORD County Superior Court. Heard in the Court of Appeals on 16 October 1974.

This was an action for damages sustained to plaintiff's property because defendant constructed roads on its adjacent mountain land thereby altering the natural drainage of surface water and causing silt and mud to stop up a drain and damage plaintiff's house and property. The defendant denied any change in the natural drainage of surface water.

The parties stipulated that the plaintiff was the owner of her property and that her property borders the defendant's property on the northern edge; that the properties were contiguous; that any construction work performed on defendant's property was performed by the defendant; that there was a pipe for the passage of water which flows under the plaintiff's house, and this pipe was present prior to any work done on the defendant's property; that plaintiff does not seek permanent damages but only damages to the time of trial.

The court heard the case without a jury.

The evidence for the plaintiff was that she had owned the property and house in question since 1966. The house is

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located over a small two-foot wide stream which prior to the defendant's construction was clear and unpolluted without any mud or silt therein. The stream under the house flows through a 22-inch pipe. Prior to the construction of roads by the defendant, neither the plaintiff nor her predecessors had ever experienced any trouble with overflows or flooding. Early in 1973, during a rain storm, the plaintiff's son witnessed a great deal of mud and silt flowing down the stream causing the pipe under plaintiff's property to fill up and overflow resulting in substantial damage to the basement and other areas of plaintiff's house. The son followed the stream up to the defendant's property and found that the mud was coming from a road being constructed there by the defendant. The mud was entering the stream directly below the road enlarging and causing it to overrun its bounds.

The defendant's evidence was to the effect that the road did not alter the natural drainage of the water nor change its path and that the road was built in conformity with engineering plans. The defendant's engineer testified that when the grading was done, they cut into the side of the mountain and piled the dirt on the downhill side. Thereafter, ditches were cut to run the water off the road and eventually into the stream.

At the conclusion of the evidence, the trial court entered a judgment as follows:

"The above entitled action, having duly and regularly come on to be heard and the Court having fully heard the matter; and the Court, having heard this matter without a Jury, hereby makes the following findings of fact:

1. The plaintiff, Addie B. Sutherland, is the owner of certain real property described in the Complaint herein; said real property being located in the Town of Lake Lure, Rutherford County, North Carolina, and being more specifically located in the Tryon Bay area of Lake Lure.

2. That the defendant, Hickory Nut Corporation is the owner of certain real property described in the Complaint herein; said real property being located in the Town of Lake Lure, Rutherford County, North Carolina; and being more specifically located near the Tryon Bay area of Lake Lure.

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3. That the real property of the plaintiff is located adjacent to the shore of Lake Lure; that the real property of the defendant is adjacent to that of the plaintiff, but not adjacent to Lake Lure; said real property of the defendant being located at a higher elevation than that of the plaintiff.

4. That during the years, 1972 and 1973, the defendant constructed roads upon its land; that said roads constructed by the defendant were the only roads constructed at this time within the watershed area in which is found the property of the plaintiff; that no roads have been constructed in the aforesaid watershed area by anyone except the defendant from the beginning of the defendant's construction in 1972 to the date of trial in this action.

5. That the aforesaid roads were not paved with asphalt or any other paving material; that the dirt excavated in the grading and construction of said roads was not taken away from the real property owned by the defendant, but was left in the watershed area referred to above in Item Number 4, said dirt, in part, being placed on the 'downhill' side of said roads.

6. That in the watershed area referred to above, a small stream, up about two feet in width, flows through the defendant's land onto the land of the plaintiff; that when the stream reaches the land of the plaintiff it flows into a twenty-two inch pipe which carries the water from the stream under the home of the plaintiff and then to the shore of Lake Lure where the water empties into the aforesaid lake.

7. That the grading and construction of roads by the defendant has altered and diverted the natural flow of water from the land of the defendant to the land of the plaintiff; that the water is diverted and flows in a different manner because of the erosion on the roads constructed by the defendant and erosion of dirt placed by the defendant adjacent to its roads; that the banks of said stream on plaintiff's property have been widened and covered by mud and silt which came from defendant's grading; that the condition herein described continues to exist at the time of trial; that the mud and sediment from this erosion flows into the stream described in Item 4 above; that the mud and sediment flows with the aforesaid stream into the

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drainage pipe flowing underneath the home of the plaintiff; that this mud clogs the aforesaid pipe, thereby blocking the drainage thereof;

8. That the erosion and resulting flow of mud and sediment from the land of the defendant to the land of the plaintiff had never before occurred in the eight year period within which the plaintiff has owned the real estate in question; that such erosion and flow of mud had never occurred prior to the construction of the aforementioned roads by the defendant.

9. That as a direct result of the grading and construction of roads by the defendant, the plaintiff, a lower landowner, has been required to receive from the higher land of the defendant mud and sediment, which in the natural condition of the land, would not be carried by the normal flow of waters from the upper to the lower tract.

10. That as a result of the flow of mud and sediment onto the land of the plaintiff, the plaintiff has suffered the following damages:

a. Mud and sediment has backed up in the aforementioned drain pipe and has consequently flowed into the basement of plaintiff's home which was formerly a recreation area.

b. This mud which settled in the basement has caused excessive moisture which, in turn, led to mildew on the inside walls of the home, 'buckling' of wood panels in the rooms above the basement, and requiring the replacement of tiles in the bathrooms; that the plaintiff had never experienced any such problems from the moisture which was concomitant with the natural drainage of the stream prior to the construction of the roads by the defendant.

c. That mud collected on the shoreline where the plaintiff maintains a boat dock making said dock unfit for use; that in an attempt to clear this dock area the plaintiff had to remove several large trees which grew on her property in order to allow drudging equipment to be brought to the area.

d. That mud has accumulated in the area adjacent to plaintiff's home and on her property damaging the landscaping thereof.

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9. That as a result of the damage enumerated above, the plaintiff has been damaged up to the time of trial in this matter in the amount of \$6,000.00.

The Court concludes as a matter of law that all damage to plaintiff's property herein set forth was directly and proximately caused by dirt, mud and sediment placed in the stream which flows through the property described herein, by the defendant corporation. That in the instant case, the parties did not consent that an issue of permanent damages be submitted to the Court; that, therefore, the damages awarded in the judgment herein represents damages sustained by the plaintiff only to the time of trial herein; that the plaintiff may maintain separate actions for damages sustained subsequent to this judgment.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff have and recover of the defendant SIX THOUSAND AND NO/100 (\$6,000.00) DOLLARS plus interest from the day of this judgment.

2. That the defendant pay the costs of this action.

This the 21st day of May, 1974.

HARRY C. MARTIN
Judge Presiding"

From the entry of this judgment, the defendant appealed.

Hamrick, Bowen & Nanney by James M. Bowen and Louis W. Nanney, Jr., for plaintiff appellee.

A. Clyde Tomblin and Robert W. Wolf for defendant appellant.

CAMPBELL, Judge.

[1] In North Carolina, "[w]e follow the 'Civil-Law Rule,' which recognizes a natural servitude of natural drainage as between adjoining lands, so that the lower owner must accept the surface water which naturally drains onto his land but, on the other hand, the upper owner cannot change the natural drainage so as to increase the natural burden." *Midgett v. Highway Commission*, 260 N.C. 241, 244, 132 S.E. 2d 599, 603 (1963). "While . . . the lower landowner is required to receive

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surface waters from higher lands when they flow naturally therefrom, he is not required to receive from the higher land dirt and rocks, or other materials, which have been piled thereon by the upper landowner and which, in the natural condition of the lands, would not be carried by the normal flow of surface waters from the upper to the lower tracts." *Ayers v. Tomrich Corp.*, 17 N.C. App. 263, 267, 193 S.E. 2d 764, 767 (1972).

[2] The evidence established that the defendant changed the natural drainage of the land by cutting into the mountain and piling the excess mud and dirt on the downhill side of the road. This alteration of the topography of the land caused mud and silt to be washed by surface waters in a manner different than had naturally existed prior to that time. In fact, the mud and silt in the stream was directly traced to the defendant's construction at a time when it was actually causing damage.

In the instant case the evidence was sufficient to support the findings of fact made by the trial judge and those findings of fact support the conclusions of law and the judgment.

Affirmed.

Judges BRITT and VAUGHN concur.

WILFORD M. SMITH v. HOUSE OF KENTON CORPORATION

No. 7426SC652

(Filed 6 November 1974)

1. Contracts § 3— future contract —setting out all terms

An offer to enter into a contract in the future must, to be binding, specify all of the essential and material terms and leave nothing to be agreed upon as a result of future negotiations.

2. Contracts § 3; Landlord and Tenant § 2— agreement to execute lease — payment of rent provision

An agreement to execute a lease relied upon by plaintiff was not binding on defendant since the agreement failed to provide for the time and manner of payment of rent.

3. Contracts § 3; Landlord and Tenant § 2— agreement to execute lease — provisions of formal lease different

Even if plaintiff's letter to defendant was sufficient to constitute a binding contract to execute a lease, plaintiff is not entitled to recover

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in this breach of contract action since the formal lease submitted by plaintiff contained provisions with respect to payment of rent, subletting of premises, maintenance, and insurance which were not mentioned in the letter.

APPEAL by defendant from *Thornburg, Judge*, 18 February 1974 Non-Jury Session of Superior Court held in MECKLENBURG County.

This is an action for damages for breach of contract. The parties waived jury trial and the evidence tended to show:

On and before 9 May 1970, plaintiff owned certain real property located at 1601 Montford Drive in the City of Charlotte. The property was equipped for use as a beauty salon and at that time defendant operated a beauty salon at another location in Charlotte. On that date, plaintiff employed Davant Realty Company [Davant] to find a tenant to lease the real estate and purchase certain equipment located thereon. Thereafter, Davant had several conversations with Mrs. Shelton, president of defendant, and Mrs. McCormac, an employee of defendant, with respect to defendant leasing the premises and purchasing the equipment. Following those conversations, Davant wrote and sent to Mrs. Shelton the following letter:

"July 15, 1970

Mrs. W. H. Shelton
416 North Spruce Street
Winston-Salem, North Carolina 27101

Dear Mrs. Shelton:

This will confirm my conversation with Mrs. McCormac that your firm agrees to lease space at 1601 Montford Drive, Charlotte, North Carolina, on the following terms and conditions:

1. Lease terms—Five (5) years, to begin on September 1, 1970 or as soon as the air conditioning can be repaired.

2. Rental rate—\$400.00 per month. Lessee will pay all utilities (The Rathskeller has a sub-meter and Davant Realty, Inc., will collect water bills from this tenant.

3. The equipment purchase—\$7,000.00—Cash.

4. Maintenance—Lessor will maintain exterior walls and roof. Lessee will maintain the interior.

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A lease is being drawn and will be forwarded to you soon. Please execute the copy of this letter as your agreement to these terms and conditions and return to us so we can take the space off the market and hold same for you.

Sincerely yours,
s/ Eugene M. Davant"

On 16 July 1970, Mrs. Shelton signed an acceptance on the bottom of the letter and returned it to Davant. On 31 July 1970, Davant wrote and sent Mrs. Shelton a second letter containing the following:

"Enclosed is original and one copy of Lease Agreement as prepared by Dr. Smith's attorney, based on your letter of intent, to lease the above mentioned beauty salon. Please look over said lease and if terms are satisfactory, execute and return original to me together with a check for two months rent at \$400.00 per month and \$7,000.00 for the equipment (see inventory list attached), a total of \$7,800.00. Upon receipt of said check the replacement of compressor on air conditioner will be ordered and installation begun as soon as possible. We expect to have the space ready by September 1, 1970 or sooner."

During the month of August 1970, several conversations were had between Mrs. Shelton, Davant and plaintiff and several letters were written and sent by Davant to Mrs. Shelton.

On 3 September 1970, defendant's attorneys wrote and sent Davant a letter containing the following:

"Mrs. W. H. Shelton, President of House of Kenton Corp., requested that we write to you to confirm her telephone conversation with you recently with reference to the premises and beauty salon located at 1601 Montford Drive, Charlotte, North Carolina.

This letter will confirm that, in view of the substantive differences between the initial arrangement intended (as set forth in the letter of July 15, 1970, from you to Mrs. Shelton) and the arrangement outlined in your letter of July 31, 1970, to Mrs. Shelton and the enclosed bill of sale and lease agreement, you and Mrs. Shelton have agreed not to proceed with the transaction."

Thereafter, plaintiff proceeded to try to lease the premises to other parties and did so on 1 October 1973 for a monthly

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rental of \$500. Defendant never took possession of the premises and plaintiff received no rent from 1 September 1970 through 30 September 1973.

At trial plaintiff elected not to pursue his claim for breach of contract to purchase the equipment for the reason that he had sold the equipment for \$7,000. The court entered judgment setting forth findings of fact and conclusions of law and adjudging that plaintiff recover \$15,046.03, representing 37 months' rent totaling \$14,800, and advertising expense in amount of \$246.03 incurred by plaintiff in attempting to find another tenant. Defendant appealed.

Welling and Miller, by Alfred F. Welling, Jr., for the plaintiff appellee.

Moore and Van Allen, by Barney Stewart III, for the defendant appellant.

BRITT, Judge.

The theory of plaintiff's action is that the defendant breached a contract to execute a lease. That the judgment was predicated on that theory is indicated by the following conclusion of law:

"3. That the written offer of the plaintiff dated July 15, 1970, when accepted by the defendant corporation on July 16, 1970, became a contract to execute a lease and as such is enforceable to the same extent as if the parties had entered into a written lease agreement containing the terms of the said contract to execute a lease."

The question then arises, was the letter dated 15 July 1970 sufficient to constitute a binding contract to execute a lease? We answer in the negative.

Our research fails to disclose any precedent in this jurisdiction which is directly in point; however, we find in opinions of our Supreme Court numerous statements of principles which we think are applicable to the case at bar.

[1] In *Young v. Sweet*, 266 N.C. 623, 625, 146 S.E. 2d 669 (1966), we find: "An offer to enter into a contract in the future must, to be binding, specify all of the essential and material terms and leave nothing to be agreed upon as a result of future negotiations. *Thompson-McLean, Inc. v. Campbell*, 261 N.C. 310,

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314, 134 S.E. 2d 671; *Wade v. Lutterloh*, 196 N.C. 116, 120, 144 S.E. 694; *Croom v. Lumber Co.*, 182 N.C. 217, 220, 108 S.E. 735; *Edmondson v. Fort*, 75 N.C. 404." Accord, *Boyce v. McMahan*, 22 N.C. App. 254, 206 S.E. 2d 496 (1974), *aff'd*, No. 50 (N.C., filed 10 October 1974).

In *Dodds v. Trust Co.*, 205 N.C. 153, 156, 170 S.E. 652 (1933), the court said:

"In the formation of a contract an offer and an acceptance are essential elements; they constitute the agreement of the parties. The offer must be communicated, must be complete, and must be accepted in its exact terms. *Gravel Co. v. Casualty Co.*, 191 N.C., [sic] 313; *Rucker v. Sanders*, 182 N.C., [sic] 609. Mutuality of agreement is indispensable; the parties must assent to the same thing in the same sense, *idem re et sensu*, and their minds must meet as to all the terms. *Croom v. Lumber Co.*, 182 N.C., [sic] 217."

Quoted with approval in *Yeager v. Dobbins*, 252 N.C. 824, 828, 114 S.E. 2d 820 (1960).

In 3 G. Thompson, Real Property § 1063, at 238 (J. Grimes repl. 1959) [hereinafter *Thompson*], we find: "In order to constitute a binding agreement to execute a lease, such agreement must be certain as to the terms of the future lease. A few points of mutual agreement are essential to a valid agreement to lease: First, the minds of the parties must have met as to the property to be included in the lease; second, the terms of the lease should be agreed upon; third, the parties should agree upon the rental; and fourth, *the time and manner of payment of rent should be stated. . . .*" (Emphasis added.)

[2] In the case at bar, the agreement relied on by plaintiff did not specify all of the essential and material terms of the lease to be executed and left much to be agreed upon by future negotiations. The offer was not complete and the minds of the parties did not meet as to all essential terms. The agreement failed to provide for one of the specifics referred to by *Thompson*, namely, the time and manner of payment of rent. The necessity for this provision with respect to rent is obvious. Whether the rent was payable monthly, quarterly, semiannually, annually, or all at one time, and whether it was payable in advance, at the end of a period or otherwise, presented a major question that finds no answer in the agreement. It might be argued that the provision of "\$400.00 per month" sufficiently implied that a monthly

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payment of rent was contemplated by the parties. The question then arises, was the rent payable in advance, in the middle of the month, or at the end of the month? A clear indication that the minds of the parties did not meet on this question is the provision in the formal lease proposed by plaintiff that defendant pay the first and last months' rent at the beginning of the five-year period.

[3] We think there is a further reason why plaintiff was not entitled to recover. Assuming, *arguendo*, that the 15 July 1970 letter was sufficient to constitute a binding contract to execute a lease, plaintiff failed to show that he tendered a lease conforming to the contract.

In 51C C.J.S. Landlord and Tenant § 200, at 516, we find: "In an action for damages brought by the proposed lessor, general rules as to the pleadings and evidence are applicable. Plaintiff has the burden of proving those facts which go to make up his cause of action, for example, that the lease tendered conformed to the contract, . . ."

In 51C C.J.S. Landlord and Tenant § 196(4), at 509, we find: "A proffered lease must comply with the terms of the agreement. If the agreement does not specify the covenants to be contained in the lease, or if it expressly provides therefor, the lease should contain only the usual covenants and provisions." We quote further from said section, at 510:

"Usual Covenants and Provisions. If the agreement does not specify the covenants to be contained in the lease, it should contain only the usual covenants and provisions. . . . Thus a covenant by the lessee to insure has been held usual.

"On the other hand, the following covenants have been held to be unusual: Covenants against assignments or underletting without the consent of the lessor; a covenant for the payment of rent in advance; . . ."

The formal lease submitted by plaintiff to defendant in the case at bar reveals a number of provisions not mentioned in the letter; we point out several of them. In addition to requiring payment of the last month's rent at the beginning of the term, it limits the lessee's right to sublet or assign without written consent of the lessor. It requires that lessee shall " . . . maintain and keep in good order and repair all heating, air conditioning,

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electrical and plumbing equipment located in the demised premises. . . . ” It further provides that lessee will purchase and maintain, at its expense, a public liability insurance policy in the amount of \$50,000 coverage for any one accident and \$100,000 for any one accident involving more than one person, which policy or policies of insurance will show as named assured the lessee and the lessor as their interests may appear.

For the reasons stated, the judgment appealed from is

Reversed.

Judges CAMPBELL and VAUGHN concur.

GAIL ADAM SPEARS v. SERVICE DISTRIBUTING COMPANY

No. 7429SC651

(Filed 6 November 1974)

1. Negligence § 57— injury in car wash — absence of instructions

In an action to recover for personal injuries received when the nozzle on the hose in a self-service car wash jumped out of the holder and struck plaintiff in the eye, the evidence was sufficient to be submitted to the jury on the question of defendant owner's negligence in failing to have instructions on the proper use of the car wash which defendant was furnishing for hire.

2. Negligence § 58— injury in car wash — contributory negligence

Evidence that plaintiff did not check other car wash stalls for instructions when she was unable to find instructions in the stall she was using, that she did not request assistance in operating the spray nozzle, and that she previously observed the nozzle fly out of its holder when she first started the car wash did not disclose that plaintiff was contributorily negligent when she placed the nozzle back in its holder while it was under pressure and the nozzle jumped from the holder and struck her in the eye.

APPEAL by plaintiff from *Martin (Harry C.)*, Judge, 29 April 1974 Session of RUTHERFORD County Superior Court. Heard in the Court of Appeals 16 October 1974.

This is a civil action to recover damages for personal injuries. At the close of the plaintiff's evidence the defendant made a motion for a directed verdict pursuant to the provisions of Rule 50. This motion was allowed by the trial court and

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plaintiff's action was dismissed. The pertinent facts are set out in the opinion.

Hamrick and Hamrick by J. Nat Hamrick for plaintiff appellant.

Morris, Golding, Blue & Phillips by James F. Blue III for defendant appellee.

CAMPBELL, Judge.

A motion for a directed verdict for the defendant should be allowed only if the evidence taken as true and considered in the light most favorable to the plaintiff is insufficient to justify a verdict for the plaintiff. *Adler v. Insurance Co.*, 280 N.C. 146, 185 S.E. 2d 144 (1971).

The evidence, when considered in the light most favorable to the plaintiff, establishes the following:

1. The defendant maintained an automobile gas service station, and in connection therewith, and at a distance of some 30 or 40 feet therefrom, the defendant had a series of six stalls where automobiles could be washed. These were self-service washing stalls. Each stall was about 10 feet in width. An arm-like mechanism extended from the wall about 6½ or 7 feet in length and on the end of the arm there was a hose about 8 feet long with a steel nozzle on the end of the hose about 2 feet long. It was designed to accommodate considerable pressure so as to knock dirt and debris off an automobile. The pressure was so great that the nozzle would vibrate in your hand.

2. No instructions on how to operate the equipment were in stall No. 1, but such instructions were in the other five stalls. The instructions had not been in stall No. 1 for some three to five months prior to the incident in question and the manager knew this. The arm with the hose and nozzle was a swinging arm and was located above the height of an automobile. Some 30 inches up the wall from the base of the stall there was located a holder in which the hose nozzle was placed when not in use.

3. The instructions which were placed in the other stalls and which were missing in stall No. 1 read as follows:

“USE AT OWN RISK

HOLD GUN

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PUSH OFF SWITCH

INSERT 25¢ IN METER

PUSH ON SWITCH

PUSH WASH OR RINSE SWITCH

PUSH OFF SWITCH

REPLACE GUN"

4. If the off switch was not cut off, the guns would jump out of the holster and flop around and kick under pressure. When the switch was cut off, the power was off, and there would be no pressure on the hose and nozzle. The station manager testified, "I have seen the hose hop out of the holster when they put their money in and didn't have the nozzle in their hand and the switch would already be on and it would flop around. I have never seen it hop out when there was no water or soap coming out of it when it was not under pressure."

5. There was a metal box on the wall with a sign painted on it saying 25 cents. The metal box had a slot in it to accommodate the 25 cents.

6. On 23 September 1972, the plaintiff took her automobile into stall No. 1. She had never been in one of the stalls of the defendant prior to this time. She had washed her automobile at similar car washes on a few occasions prior to this time. The pressure was stronger at this car wash than at any car wash plaintiff had previously used. On entering the stall, plaintiff observed a little box that said 25 cents, and she accordingly put 25 cents therein. Before doing this, she looked for some instructions but saw none as there were none there. She also looked for controls and switches but saw none. When she put the quarter in the box, she did not have the hose handle in her hand, and it flew out of the holster and lodged under the wheel of her automobile. Plaintiff reached down and picked it up and began to wash her car. At this time the plaintiff realized that this hose had tremendous pressure on it and so much pressure that she could hardly hold the nozzle in her hand. She used two hands to hold it while she rinsed her automobile off. After completing the wetting down of her automobile, she replaced the nozzle in the holder in order that she could proceed with putting soap on her automobile before completing the washing thereof. While she knew that it had jumped out of the holder once be-

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fore, she did not know for sure that it would do it again because, for all she knew, whoever had put the nozzle in before she arrived had not done so properly. At any rate, on this occasion, it stayed in the holder for a minute or so; and while she turned to get her soap and rag, the nozzle "flew out and started beating her over the head." It struck her in the right eye breaking her glasses and cutting her eye.

7. Plaintiff's injury consisted of a cut right eye requiring several stitches and she incurred doctor and hospital expenses and missed three days from work.

[1] The plaintiff's evidence established that the car wash was under the management and control of the defendant; that with the defendant's knowledge, no instructions were present as to the use of the spray nozzle; that in the absence of any instructions as to the proper use of the spray nozzle, plaintiff was using it in a manner that the defendant should have expected the public would use. We are of the opinion that the evidence on behalf of the plaintiff was sufficient to take the case to the jury on the question of negligence on the part of the defendant in failing to have proper instructions in the use of the facilities which the defendant was furnishing for hire.

We next consider whether or not the plaintiff was contributorily negligent as a matter of law. Dismissal on that ground is proper only if plaintiff's evidence, considered in the light most favorable to her, so clearly establishes her own negligence as one of the proximate causes of her injuries that no other reasonable inference may be drawn therefrom. *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47 (1969).

[2] The defendant contends that the plaintiff had sufficient knowledge to apprise her of the fact that if she replaced the nozzle in its receptacle while it was still under pressure, it would fly back out. The basis for this is the plaintiff's testimony that she did not check the other stalls for instructions; did not request any assistance in operating the sprayer; and that she previously observed the nozzle fly out of its holder when she first started the car wash. The defendant contends that the plaintiff was therefore contributorily negligent as a matter of law. We do not agree with this contention. We think the plaintiff was entitled to assume that the car wash was safe to be operated by her as it was provided for the public generally upon payment of a fee of 25 cents. It was not incumbent upon her to

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go to the other stalls and inspect them before using the stall which was available and provided by the defendant. Neither was it incumbent upon the plaintiff to seek other assistance in operating the car wash when the sign clearly indicated that all she had to do was insert 25 cents. The plaintiff likewise could assume that the fact that the nozzle flew out the first time when she first inserted her 25 cents was because the previous user had not put the nozzle in the holster correctly. She could assume that if she put it in correctly, it would not fly out and thrash around in such manner as to injure an operator. "The question of contributory negligence in not appreciating or in failing to observe dangers incident to one's situation is generally one for the jury and is rarely a question of law for the court." 57 Am. Jur. 2d, Negligence, § 333, p. 735 (1971). If, from the circumstances surrounding the plaintiff's injury and conduct, reasonable men could indulge different inferences as to the plaintiff's negligence, the question of such negligence should be submitted to the jury and is not a proper subject for dismissal.

Reversed and remanded.

Judges BRITT and VAUGHN concur.

CHARLOTTE GAMMAGE JOHNSON v. RAYMOND EDWARD JOHNSON AND WINN-DIXIE RALEIGH, INC.

No. 7410SC757

(Filed 6 November 1974)

1. Evidence § 54— momentum of truck — improper hypothetical question

In this action for damages arising out of an automobile-truck collision, the trial court did not err in the exclusion of expert testimony as to the momentum of a 50,000 pound tractor-trailer where the testimony was based on a hypothetical question which failed to include the pertinent facts that the truck was veering to the left and was decelerating at the time of the impact.

2. Evidence § 29; Witnesses § 7— testimony from notes — recollection not refreshed — past recollection recorded

The trial court did not err in permitting a doctor to testify from notes which did not refresh his recollection, rather than requiring the notes to be placed in evidence, where it was established that the doctor personally made the notes, that they were made contemporaneously with each visit by plaintiff and that they fairly and accurately represented what had occurred.

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3. Evidence § 50— medical testimony — conclusion of expert — absence of prejudice

In an action to recover for injuries received in an automobile-truck collision, plaintiff was not prejudiced by the admission of a doctor's conclusions as to primary and secondary gains that a patient seeks in exhibiting post-traumatic neurosis since the testimony could have supported a greater award for pain and suffering.

APPEAL by plaintiff from *McClelland, Judge*, 18 March 1974 Civil Session of WAKE County Superior Court. Heard in the Court of Appeals 17 October 1974.

This is a civil action for damages arising out of an automobile-truck collision. The plaintiff's complaint basically asserts that on 19 March 1968, she was driving her Cadillac along Wade Avenue Extension in Raleigh, N. C., near its intersection with Glenwood Avenue, and that the defendant-driver, through his negligence, crashed into the rear end of her car causing her some \$200,000 damage.

At the trial, plaintiff put on eight witnesses, including three medical doctors who testified that the plaintiff had suffered a mild back strain and that sometime after the accident the plaintiff had begun to suffer from degenerative changes in her body which were triggered by post-traumatic neurosis. Plaintiff also offered the testimony of a PhD in mechanical engineering for the purpose, *inter alia*, of hypothetically showing to the jury the momentum of a 50,000 pound tractor-trailer. The defendants' objection to the introduction of this testimony was sustained. It was established in the other testimony that the tractor-trailer was moving approximately five miles per hour when it struck plaintiff's car in the left rear as the truck was veering to the left to avoid the collision.

The defendant put on two doctors, one by way of deposition. The first doctor, an orthopedic surgeon who had treated the plaintiff, testified by referring to notes he had taken after each visit by the plaintiff. The plaintiff's objection to the introduction of this evidence was overruled. Thereafter, the deposition of a neurologist was offered. In this deposition, the doctor testified as to the various tests he had performed on the plaintiff and the results. Toward the end of the deposition, the doctor testified as to the plaintiff's post-traumatic neurosis and the attendant primary and secondary gains realized by the patient for exhibiting the neurosis. When counsel for the defendants sought to go into these gains, counsel for plaintiff objected,

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the court overruled these objections and the neurologist was allowed to express his opinion on the plaintiff's particular situation with regard to primary and secondary gains.

After the defendants rested, the case was submitted to the jury which found that the plaintiff had not been injured by the negligence of the defendant-driver. Judgment was filed on 29 March 1974 wherein it was ordered that the plaintiff recover nothing of defendants. Plaintiff's motion for a new trial was denied whereupon plaintiff appealed.

Blanchard, Tucker, Denson & Cline by Charles F. Blanchard and Charles A. Parlato for plaintiff appellant.

Teague, Johnson, Patterson, Diltthey & Clay by Ronald C. Diltthey and C. Woodrow Teague for defendant appellees.

CAMPBELL, Judge.

[1] The appellant contends that the trial court erred in excluding the testimony of their expert relative to the momentum of a different object at a different speed. There can be little doubt that the ordinary juror could have been enlightened by the testimony of an expert regarding the measurement of momentum, but this kind of testimony, on the facts of this case, would not aid the jury in disposing of the issues. The jury could understand and appreciate the basic difference in the forces applied when a 50,000 pound trailer-truck strikes a car and those applied when a 6,000 pound pickup truck strikes one. In any event, the testimony elicited by the expert was based on a hypothetical question which eliminated some very pertinent facts, to-wit, the truck was veering to the left at impact and was decelerating at the time. The presence of these factors would alter the vectorial forces applied. Consequently, their omission might serve to confuse the issues before the jury. We find that the exclusion of this testimony was within the discretion of the trial judge and was not error.

[2] The appellant also contends that the trial court erred in admitting the testimony of a doctor who had no independent recollection of the events to which he testified. The appellant particularly contends that the testimony of the doctor was taken by direct reference to his notes and that since his notes did not refresh his recollection, they were "past recollections recorded." Plaintiff's objection to this testimony was overruled, and the doctor was allowed to read from them in answer to questions.

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It was established that the doctor personally made the notes, that they were made contemporaneously with each visit by the plaintiff and that they fairly and accurately represented what had gone on. As a consequence, the notes were admissible as evidence even though they were never actually offered. The plaintiff asserts that if a witness has no present recollection of the facts in his notes, those facts must be elicited by means of the writing itself. This statement of the law is unquestioned. Nevertheless, the notes may be offered through the doctor himself. "The commonest application of the principle is in cases permitting an attorney . . . to relate from his notes the testimony given on a former trial. . . ." 1 Stansbury, N. C. Evidence, § 33 (Brandis Rev. 1973). We believe that there was no error in allowing the doctor to testify from his notes where a proper foundation was laid as it was in this case. See also 98 C.J.S., Witnesses, § 358(c) (1957).

[3] The appellant further contends that the trial court erred in admitting certain conclusions made by a doctor in a deposition read to the jury. The conclusions referred to were ones relating to primary and secondary gains that a patient seeks in exhibiting post-traumatic neurosis. This testimony was particularly related to the doctor's conclusion that the plaintiff had developed post-traumatic neurosis. This testimony was in the form of an opinion which was admittedly speculative. Though the plaintiff complains of the allowance of this opinion in evidence, it actually could have supported a greater award for pain and suffering. In a similar case, a woman was allowed to recover for physical injuries resulting from madness and emotional shock created by a bill collector. See *Crews v. Finance Company*, 271 N.C. 684, 157 S.E. 2d 381 (1967). In like manner, mental suffering accompanying physical injury is a proper element of damages. See *Britt v. R. R.*, 148 N.C. 37, 61 S.E. 601 (1908). We find that in the circumstances of this case, the plaintiff was not prejudiced by the doctor's conclusions.

The appellant's last assignment of error was that the trial court erred in failing to grant the plaintiff a new trial. Upon review of the record, we find that the plaintiff's contentions were submitted to the jury on stipulated issues and that since the charge of the court was omitted, it is presumed proper. The jury could have found that the defendant-driver was not negligent or that the plaintiff was not injured by that negligence. It was within the province of the jury to so conclude and we

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find no abuse of discretion by the trial court in denying plaintiff's motion for a new trial.

We find no error.

Judges BRITT and VAUGHN concur.

WILLIAM W. HEDDEN v. C. F. HALL, JR., AND WIFE, MARCELLA I. HALL

No. 7430SC542

(Filed 6 November 1974)

1. Evidence § 48—expert witness — failure to object specifically to qualifications

The trial court did not err in overruling defendants' general objections to testimony from an expert witness where defendants did not request a *voir dire* examination to determine the witness's qualifications, nor did defendants object specifically to the witness's qualifications as an expert.

2. Appeal and Error § 30—objection to admission of plat — consideration on appeal

Defendants' objection to the trial court's admission of a plat into evidence is not considered by the court on appeal where defendants' objection does not appear in the record.

3. Adverse Possession § 24; Trespass § 6—proof of title by adverse possession — evidence of general reputation that land owned by possessor

In an action to recover damages for alleged trespass where defendant denied plaintiff's title, the trial court did not err in allowing a witness to testify that he had been told for twenty-five years that the land in question belonged to plaintiff, since plaintiff was establishing title by showing evidence of adverse possession, and general reputation that the land is owned by the person in possession is admissible as showing the notoriety of the possession.

4. Trespass § 8—trespass to land — diminished value as measure of damages

Trial court's instructions on diminished value were proper in an action to recover damages for alleged trespass, though the court did not also instruct the jury to disregard evidence of the value of severed trees.

5. Trial § 3—continuance — failure to make motion

Defendants cannot complain that the trial court erred in allowing the trial to proceed prior to the making of a court ordered survey since defendants did not move for a continuance based upon the absence of the survey.

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6. Rules of Civil Procedure § 50—motion for directed verdict—failure to state grounds

Trial court properly denied defendants' motion for a directed verdict where defendants did not state the specific grounds therefor as required by G.S. 1A-1, Rule 50(a).

DEFENDANTS appeal from *Thornburg, Judge*, 26 November 1973 Session of Superior Court held in MACON County. Argued in the Court of Appeals on 15 October 1974.

Plaintiff instituted this action to recover damages for alleged trespass upon his property by defendants. Defendants answered denying plaintiff's title, alleging title in themselves, and praying that defendants be declared owners of the property in dispute.

The problem arose when defendants began preparing land for a subdivision, and, acting on the assumption that their property in Jackson County extended by deed westward to the Macon County line, caused numerous trees near the Macon County line to be cut down. Briefly stated, plaintiff's evidence tends to show that plaintiff by deed owns two tracts of land contiguous to defendants' land, but situated somewhere to the east thereof, and extending eastward *over* the Macon County line into Jackson County where defendants had been working. Defendants' evidence tends to show that *both* parties derive title to the disputed area from a common grantor with defendants having a superior claim over the lappage created by the rival deeds. A jury answered the following questions submitted by the trial judge:

"1. Is plaintiff the owner and entitled to possession of those lands described in plaintiff's Exhibits One and Two as the easterly boundary thereof is located on plaintiff's Exhibit Five?

Answer "A": As to Moore tract, described in plaintiff's Exhibit One? Yes.

Answer "B": As to James tract, described in plaintiff's Exhibit Two? Yes.

2. Are defendants C. F. Hall, Jr., and wife, Marcella I. Hall the owners and entitled to possession of those lands described in defendants' Exhibit "B" as the westerly boundary thereof is located on defendants' Exhibits "L" and "R"?

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Answer:

3. What amounts of damages for trespass, if any, is plaintiff entitled to recover of the defendant C. F. Hall, Jr.?

Answer: \$2300.00."

Defendants appealed.

Stedman G. Hines and Louis Wilson, for plaintiff appellee.

Holt & Haire, by R. Phillip Haire and Creighton W. Sossomon, for defendants appellants.

MARTIN, Judge.

At the outset we note two shortcomings in record and briefs which have caused some difficulty in our consideration of this appeal. First, none of the maps before us seem to have been prepared for the purpose of showing the contentions of each party to this lawsuit, and, therefore, they are not conducive to a clear understanding of the case. "It is highly desirable in the trial of a lawsuit involving the location of disputed boundary lines to have one map showing thereon the contentions of all the parties." *Midgett v. Midgett*, 5 N.C. App. 74, 168 S.E. 2d 53 (1969). Second, defendants now raise objections to certain evidence which, according to the record, was presented at trial without objection.

[1] Defendants contend that the trial court erred in overruling defendants' general objections to testimony from Lake Ledford regarding Ledford's survey of the property for plaintiff. Defendants argue they should have been allowed, on voir dire, to examine Ledford's qualifications as an expert witness. However, defendants have not shown us in the record, nor have we found, where they requested a voir dire examination of Ledford, or even where they objected specifically to Ledford's qualifications as an expert. "Objection to a witness' qualifications as an expert is waived if not made in apt time on this special ground, even though a general objection is taken." *Paris v. Aggregates, Inc.*, 271 N.C. 471, 157 S.E. 2d 131 (1967). Defendants' objections on this point are therefore waived.

[2] Defendants also argue the trial court erred in admitting a plat into evidence which could not have been made until at least 1952 where Ledford testified it was made by him in 1951. No objection thereto appears in the record. Hence, defendants'

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objection to this evidence is lost. *Dunn v. Brookshire*, 8 N.C. App. 284, 174 S.E. 2d 294 (1970).

[3] Defendants assign as error the following testimony by Cabe, a witness for plaintiff:

"Q. Do you know who that land did belong to?

A. I had always been told it was the Hedden land, or, Will Hedden's land, for twenty-five years. Twenty years at that time."

The denial of plaintiff's allegations of title and trespass placed the burden on plaintiff of establishing each of these allegations. *Bowers v. Mitchell*, 258 N.C. 80, 128 S.E. 2d 6 (1962). It appears from the record that plaintiff was establishing title by showing evidence of adverse possession. "On the issue of adverse possession, general reputation that the land is owned by the person in possession is admissible as showing the notoriety of the possession." Stansbury, N. C. Evidence, Brandis' Revision, § 149, p. 501. This assignment of error is overruled.

[4] Next, defendants complain the trial court erred in instructing the jury on the diminished value of the property as the measure of damages for trespass without instructing the jury to disregard evidence of the value of the severed trees. "The measure of damages for wrongful trespass upon realty in cutting and removing timber is the difference in the value of the land immediately before and after the trespass." 7 Strong, N. C. Index 2d, Trespass, § 9, p. 243. The court correctly charged on diminished value damages; and, whereas the evidence pertaining to the value of the trees was significantly less in amount than the evidence of diminished value, we fail to see how defendants could be prejudiced by any consideration the jury may have given to the value of the trees. Therefore, this assignment of error is overruled.

[5] Defendants also argue the trial court erred in allowing the trial to proceed prior to the making of a court ordered survey. An affidavit of the Clerk of Superior Court of Macon County indicates that the court had ordered a survey of the lands presently in dispute. Clearly, defendant had knowledge of the court ordered survey since both parties deposited money pursuant to that order. Defendants, by their own admission, failed to move for a continuance based upon the absence of a court ordered survey. Thus, they will not now be heard to complain at this late time.

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[6] Finally, defendants contend in their brief that plaintiff's evidence failed to make out a prima facie showing of title sufficient to get to the jury, and, therefore, defendants' motion for a directed verdict should have been granted. The record shows that defendants did not state the specific grounds for their motion as required by N.C.G.S. 1A-1, Rule 50(a). This provision of the rule is mandatory. *Turner v. Turner*, 9 N.C. App. 336, 176 S.E. 2d 24 (1970). While defendants did specifically question the sufficiency of the evidence in their motion for judgment notwithstanding the verdict, we fail to see how this can cure the defective motion for directed verdict. A motion for judgment notwithstanding the verdict is technically only a renewal of the motion for directed verdict, and, thus, it cannot assert a ground that was not included in the motion for directed verdict. 9 Wright & Miller, Federal Practice and Procedure, § 2537, p. 598 (1971). The federal rules of civil procedure also require that a motion for directed verdict state the grounds therefor. Referring to this requirement, the Fourth Circuit Court of Appeals states:

"... [W]e think it important that this requirement of the rule be observed, particularly in view of the enlarged powers granted the court with respect to such motions by Rule 50(b), as otherwise judgment might be entered on such a motion after the close of the trial and on a ground which could have been met with proof if it had been suggested when the motion was made. We do not mean to say that technical precision need be observed in stating the grounds of the motion, but merely that they should be sufficiently stated to apprise the court fairly as to movant's position with respect thereto." *Virginia-Carolina Tie & Wood Co. v. Dunbar*, 106 F. 2d 383 (1939).

This assignment of error is overruled.

Defendants' other assignments of error are without merit and are overruled.

No error.

Chief Judge BROCK and Judge PARKER concur.

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STATE OF NORTH CAROLINA v. MARVIN RAY NELSON AND
JAMES PATRICK MARTIN, JR.

No. 7426SC594

(Filed 6 November 1974)

1. Criminal Law § 91—absence of witness—continuance denied

Trial court did not abuse its discretion in denying defendant's motion for continuance based upon the absence of a defense witness.

2. Criminal Law § 66—in-court identification of defendant—observation at crime scene as basis

Trial court did not err in allowing an in-court identification of defendant where the evidence on *voir dire* showed that the identification was based on the witness's observation of defendant on the day he was robbed.

3. Criminal Law § 87—leading questions asked by judge

The trial judge did not abuse his discretion in asking leading questions during a *voir dire* examination of a witness.

4. Criminal Law § 169—overheard conversation—failure to show prejudice

Even if testimony by a witness as to a conversation between occupants of a car which he overheard while being confined in the car's trunk was inadmissible, defendants failed to show how they were prejudiced thereby.

5. Criminal Law § 169—objection to question—failure to show what answer would have been

The sustaining of an objection to a question directed to a witness will not be deemed prejudicial when the record fails to disclose what the answer would have been had the objection not been sustained.

6. Criminal Law § 86—prior inconsistent statement—impeachment of defendant

The trial court did not err in allowing the district attorney to use a signed statement made by defendant concerning possession of his pistol to show that defendant had made prior statements inconsistent with his testimony at the trial.

DEFENDANTS appeal from *Falls, Judge*, 18 February 1974 Session of MECKLENBURG Superior Court. Argued in the Court of Appeals on 14 October 1974.

Defendants were tried upon separate bills of indictment charging them with the armed robbery and kidnapping of Charles Carrigan. The State's evidence tended to show the following. At 7:30 p.m. on 20 September 1973, Charles Carrigan had just left a store and was proceeding to his car when he

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was stopped at gunpoint by two men. Carrigan was ordered to drive these two men to a warehouse where they robbed him of \$8.00 and placed him into the car's trunk. After twenty to thirty minutes of traveling around Charlotte streets while confined in his car's trunk, Carrigan managed to escape and notify the police. Charlotte police found the car approximately two hours later and checked it for fingerprints. Defendant Martin's palm and two fingerprints were found on the car. Both defendants took the stand and claimed that a third party, Jerry McMillan, had picked them up in a car which had someone in its trunk. After learning that someone was in the trunk, defendants got out of the car and went their separate ways. From a verdict of guilty as charged, and total sentences of not less than 57 nor more than 60 years for each defendant, the defendants appealed.

Attorney General Carson, by Assistant Attorney General Donald A. Davis, for the State.

J. Reid Potter, for defendant appellant Nelson.

Edmund A. Liles, for defendant appellant Martin.

MARTIN, Judge.

[1] Defendants bring forward numerous assignments of error, all of which apply to both defendants. Defendants first contend that the trial court erred in denying their motion for a continuance made at the start of their trial. The motion was based upon the absence of a defense witness, Jerry McMillan, even though a subpoena had been issued. A motion for a continuance is addressed to the sound discretion of the trial judge, whose ruling thereon is subject to review only in case of manifest abuse. *State v. Penley*, 6 N.C. App. 455, 170 S.E. 2d 632 (1969). Defendants have not shown, nor do we perceive a manifest abuse of discretion.

[2, 3] In their second assignment of error, defendants claim the trial court erred in allowing Carrigan's in-court identification of defendants in that the identification was tainted by impermissibly suggestive photographs of defendants shown to Carrigan. We disagree. *Voir dire* examination revealed that Carrigan's in-court identification was based upon what he saw the day he was robbed. Based upon competent evidence, the trial court made findings to this effect and concluded that Carrigan's in-court identification was admissible. Findings of fact by the trial judge and conclusions drawn therefrom on *voir dire* exami-

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nation are binding on the appellate courts if supported by competent evidence. *State v. West*, 17 N.C. App. 5, 193 S.E. 2d 381 (1972). Defendants also complain that the trial court erred by asking leading questions during *voir dire* examination. "The trial judge has discretionary power to permit the use of leading questions in order to save time. (Citations.) He also has the power to question a witness himself for the purpose of clarifying his testimony. (Citations.)" *State v. Collins*, 22 N.C. App. 590, 207 S.E. 2d 278 (1974). We find no abuse of the trial court's discretion in this matter. Defendants' objection to the admission of Carrigan's in-court identification was properly overruled, and the evidence thereof was properly admitted.

[4] Defendants' third assignment of error challenges the admissibility of Carrigan's testimony describing a brief conversation by the occupants of the car which Carrigan overheard while being confined in the car's trunk. In their brief, defendants argue that, notwithstanding the harmless effect of this evidence, the prosecuting attorney and the State should be penalized, in the form of a reversal, for their improper solicitation of this testimony. We decline the offer. Assuming, without deciding, that the testimony was inadmissible, defendants have not shown us how it could have adversely affected the result in their case.

The fourth assignment of error is expressly abandoned.

[5] In their fifth and seventh assignments of error, defendants complain that the trial court erred in sustaining objections to questions concerning the role of Jerry McMillan in this case. Except for one instance, the record fails to show what the excluded evidence would have been. The sustaining of an objection to a question directed to a witness will not be deemed prejudicial when the record fails to disclose what the answer would have been had the objection not been sustained. *State v. Sasser*, 21 N.C. App. 618, 205 S.E. 2d 565 (1974). On one occasion, the record does disclose what the answer would have been. However, the content of the answer does not indicate that Jerry McMillan participated in the crime nor that he had knowledge of defendants' innocence. The excluded evidence only shows that McMillan had threatened defendants about implicating him in the crime. Evidence which tends to raise no more than an inference or conjecture of the guilt of a third party is inadmissible. *State v. Smith*, 211 N.C. 93, 189 S.E. 175 (1937).

[6] In their next assignment of error, defendants contend the trial court erred in allowing the district attorney to use a signed

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statement made by defendant Martin for the purpose of impeaching defendant Martin. Defendant Martin testified on cross-examination that on 20 September 1974 Jerry McMillan had Martin's pistol. The district attorney then elicited the following testimony from Martin:

"Q. When did he give it back to you?

A. I haven't received it yet.

Q. Never got it back?

A. No."

Defendant Martin was then questioned about a written statement which defendant Martin admitted having signed. The written statement indicated that on 22 September, two days later, defendant Martin *did* have his pistol. This evidence was competent to show that defendant had made prior statements inconsistent with his testimony at the trial. *State v. Walker*, 6 N.C. App. 740, 171 S.E. 2d 91 (1969); 1 Stansbury, N. C. Evidence, Brandis Revision, § 46.

Finally, defendants concede that their motion for nonsuit was properly overruled by the trial court. We find no prejudicial error in the trial.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. WILLIAM LOGAN

No. 7426SC669

(Filed 6 November 1974)

1. Searches and Seizures § 3—probable cause defined

Probable cause, as used in the Fourth Amendment and G.S. 15-25(a), means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender.

2. Searches and Seizures § 3—confidential informant—sufficiency of affidavit for search warrant

Affidavit for a search warrant based on information received from a confidential informant sufficiently informed the magistrate

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of the underlying circumstances from which the informer concluded that the narcotics were in a certain motel room where it stated that the informant had been to the motel room some four hours earlier and had seen heroin and marijuana, he had seen other people purchase heroin and marijuana from defendant, defendant offered to sell him marijuana and heroin, and the informant knew what the drugs looked like because he had used them for several years; furthermore, the affidavit contained sufficient information for the magistrate to conclude that the informant was credible and his information reliable where it stated that the affiant had known the informant for six months and had used his information on prior occasions to compare with that of other informers, that his information had helped to arrest two other people who were awaiting trial, and that his information had been used in cases still under investigation.

3. Narcotics § 4—narcotics in motel room—constructive possession

The State's evidence was sufficient to be submitted to the jury on issues of defendant's guilt of possession of heroin and possession of marijuana where it tended to show that defendant was registered in a motel room under another name, that when officers entered the motel room defendant and another person were in one of the two beds in the room, and that heroin and marijuana were found under the mattress of the unoccupied bed.

4. Narcotics § 4.5—constructive possession—control of premises—instructions

The trial court did not err in instructing the jury that if it should find that defendant was in control of the premises where heroin was found, it could infer that he knowingly possessed the heroin.

APPEAL by defendant from *Ervin, Judge*, 11 February 1974 Schedule B Criminal Session of Superior Court held in MECKLENBURG County.

Defendant was charged in separate bills of indictment with (1) possession of heroin and (2) possession of marijuana with intent to distribute on 24 April 1973. He pleaded not guilty to all charges. A jury found him guilty of possession of heroin and simple possession of marijuana. From judgment imposing prison sentences, he appealed.

Attorney General James H. Carson, Jr., by Assistant Attorney General Charles M. Hensey, for the State.

Paul J. Williams for the defendant appellant.

BRITT, Judge.

Defendant's first and sixth assignments of error are deemed abandoned since they are not set out in his brief and no reason or argument is stated, or authority cited, with respect to them. Rule 28, Rules of Practice in the Court of Appeals.

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By his second assignment of error, defendant challenges the validity of the search warrant under which the officers searched his motel room and the admission into evidence of the heroin and marijuana found as a result of the search. The warrant described with reasonable certainty the premises to be searched and the evidence for which the search was to be made, as required by G.S. 15-26(a). It was issued by a magistrate and bore the date and hour of its issuance, as required by G.S. 15-26(c). The question presented is whether the affidavit upon which the search warrant was issued indicates a sufficient basis for the finding of probable cause. If it does, the search warrant was valid and the fruits of the search were competent evidence; if not, the fruits of the search were incompetent. G.S. 15-27(a).

[1] Probable cause, as used in the fourth amendment and G.S. 15-25(a), means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971).

Whether the affidavit is sufficient to show probable cause must be determined by the issuing magistrate rather than the affiant. This is constitutionally required by the fourth amendment. *Johnson v. United States*, 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367 (1948).

In *State v. Vestal*, *supra*, pages 576-77, Justice Lake, quoting from *Aguilar v. Texas*, 378 U.S. 108 (1964), set out the two-fold test for probable cause as follows:

“ . . . [T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the [articles to be searched for] were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was ‘credible’ or his information ‘reliable.’ ”

The affidavit upon which the search warrant in this case was obtained reads as follows:

“H. F. Frye Officer Charlotte-Mecklenburg Vice Control Bureau, being duly sworn and examined under oath, says under oath that he has reliable information and reasonable cause to believe that William Logan has on his

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premises—room 106 Horne's Motel controlled substances, to wit: Marijuana and heroin in violation of the North Carolina law. These illegally possessed controlled substances are located on the premises—1240 S. I-85 Charlotte, N. C. described as follows: a brick motel named Horne's located at 1240 S. I-85 room 106 to be searched. The facts which establish reasonable grounds for issuance of a search warrant are as follows: I received information from an informer that William Logan is in room 106 at Horne's Motel at I-85 and Freedom Dr. and is selling marijuana and heroin at this room. This informer said that he has been in this room in the last four hours and has seen this marijuana and heroin. He said that Logan offered to sell him some and that he saw several other people buy some from Logan. This informer is well aware of what both drugs are and has admitted to me that he has used both for several years. This informer said that he has known Logan for a long time and has bought drugs from him many times in the past. He said that he bought from him when he lived off Remount Rd. and from his house in Hidden Valley.

"I HAVE USED THIS INFORMER'S INFORMATION FOR APPROX. SIX MONTHS AND DURING THAT TIME HAVE USED HIS INFORMATION TO COMPARE WITH THAT OF OTHER INFORMERS. HIS INFORMATION HELPED IN THE ARREST OF PRIMUS CROSBY AND PAUL JACKSON. BOTH OF THESE ARE NOW AWAITING TRIAL IN MECKLENBURG COURTS. HIS INFORMATION HAS ALSO BEEN USED IN CASES STILL UNDER INVESTIGATION. (Emphasis added.)

"William Logan is well known to the Vice Squad and he has three cases pending for marijuana and is out on appeal for possession of heroin.

"Due to the facts in this affidavit I believe I have good and reasonable cause to ask for this search warrant.

"Logan is registered in this room as James Dunlap."

At the voir dire hearing to determine the validity of the search warrant, the officer who signed the affidavit presented evidence which tended to show that he was the sole witness who appeared before the magistrate at the time the search warrant was issued. He stated that he did not remember giving the magistrate any information other than that contained in the affidavit and he could not recall any questions that the magis-

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trate asked. The magistrate also testified that he could not remember asking questions about the reliability of the past information that the informer had given the officer. Therefore, a finding of probable cause in this case must be based solely upon the allegations in the affidavit.

[2] As to the first requirement of probable cause, that the magistrate must be informed of the underlying circumstances from which the informer concluded that the contraband to be seized was in the motel room, it is clear that the affidavit was sufficient. The informant had been to the motel room four hours earlier and had seen the heroin and marijuana; he had seen other people purchase marijuana and heroin from the defendant; the defendant had offered to sell him some marijuana and heroin; and, the informant knew what marijuana and heroin looked like because had used them for several years.

Defendant contends that the affidavit did not contain sufficient information for the magistrate to conclude that the informant was credible or his information reliable. We disagree with this contention. The affidavit reveals that the officer had known the informant for six months; that the officer had used his information on prior occasions to compare with that of other informers; that his information had helped to arrest two other people who were awaiting trial; and that his information had been used in cases still under investigation. We think that this is sufficient information to conclude that the informant is credible and reliable.

In defendant's third and fourth assignments of error, he contends the court erred in not granting his motions for nonsuit at the close of the State's evidence and at the close of all the evidence. The question for the court is whether there is substantial evidence of each essential element of the offenses charged or of a lesser included offense, and of the defendant's being the perpetrator of the crime. If there is substantial evidence, the motion is properly denied. *State v. Vestal, supra*.

[3] The State's evidence tended to show: That from reliable and credible information, officers believed that defendant was in room 106 at Horne's Motel at S. I-85 in Charlotte registered in the name of Logan or James Dunlap; that upon arriving at the motel, the defendant's car was seen; that the register was checked to determine which room defendant was registered in; that defendant was not registered in his name but as James Dunlap; that a picture of defendant was shown to the desk

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clerk to see if he could identify defendant; that the name of James Dunlap was registered for room 106; that one officer watched the room for about an hour and saw several people come and go, but not the defendant; that when another officer arrived with the search warrant, the officers went to room 106, knocked on the door, and when no one answered they opened the door with a pass key; that defendant and a woman were in one of the two beds in the room; that there was a .38 caliber revolver on the table between the beds; that heroin and marijuana were found under the mattress of the unoccupied bed; that \$98 was taken from defendant's wallet.

Defendant was charged with possession of heroin and possession of marijuana with intent to distribute. Possession of narcotics was defined in *State v. Harvey*, 281 N.C. 1, 12-3, 187 S.E. 2d 706, 714 (1972), as follows:

"An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. Also, the State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.'" (Citations omitted.)

We hold that the evidence was sufficient to survive the motions for nonsuit.

[4] By his fifth assignment of error, defendant challenges the court's instruction that if the jury should find that the defendant was in control of the premises, they could infer that he knowingly possessed the heroin. The wording of this instruction finds support in *State v. Harvey*, *supra*. Therefore, we find no merit in the assignment.

We hold that the trial of the defendant was without prejudicial error.

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No error.

Judges CAMPBELL and VAUGHN concur.

JOHN HUTCHINS v. CORNELIA C. STANTON, C. P. COBLE, ROSS
COBLE, MRS. S. G. COBLE

No. 7415DC653

(Filed 6 November 1974)

Injunctions § 7—erection of boundary fence—temporary injunction—
ancillary nature

In an action by lessee seeking a temporary restraining order to prevent adjacent property owners from interfering with the erection and maintenance of a replacement boundary fence on the leased property, the trial court erred in granting the temporary injunction, since it could not be made ancillary to either a processioning proceeding to be brought in the future by a person not a party to the action or to a continuance of this action for a permanent injunction when a permanent injunction was beyond the scope of the pleadings.

APPEAL by defendants from *Paschal, Judge*, 15 April 1974 Session of District Court held in ALAMANCE County. Heard in the Court of Appeals 18 September 1974.

Plaintiff brought this action 5 April 1974 seeking a temporary restraining order and "such other and further relief as the Court may deem proper" to prevent defendants from interfering with the erection and maintenance of a replacement boundary fence on property leased to the plaintiff by its owner, Hal N. Wood. In his complaint plaintiff maintained that a new fence was needed on the existing fence line of the property to enable him properly to use the leased property for grazing cattle but that defendants, adjacent property owners, had ordered agents of the plaintiff to desist from erecting the new fence and had threatened to remove any structures erected by them. Based on these facts the trial judge immediately granted a temporary restraining order ex parte pending a hearing on the matter on 23 April 1974.

After receiving notice from defendants that they would move to vacate the restraining order as being improvidently granted, plaintiff amended his complaint to allege that he would "be caused immediate and irreputable (sic) injury, loss or dam-

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age before notice could be served and a hearing held thereon if a temporary restraining order is not granted allowing him to erect the fence upon the existing fence line and further allowing him to graze his cattle on the pasture land encompassed within the fence line." The court also was requested to set an appropriate amount of security to be posted by the plaintiff for the payment of such costs and damages as might be incurred or suffered by any party found to be wrongfully enjoined or restrained. Plaintiff stated in the amended complaint that \$200 already had been deposited with the Clerk of Superior Court for this purpose. An order setting a date for a hearing to determine whether a preliminary injunction should be issued was the final relief sought by the plaintiff.

Based upon the complaint as amended, the trial judge concluded that the plaintiff would suffer "irreputable (sic) injury, loss or damage" unless the fence was erected immediately and granted a second temporary restraining order *ex parte*. The order further required a \$200 bond be posted by the plaintiff as requested and stated that a hearing on the plaintiff's motion for a preliminary injunction would be held 17 April 1974.

On 18 April 1974 defendants filed an answer to the plaintiff's amended complaint. In their answer defendants noted they owned various tracts of land adjoining the lands owned by Hal Wood [leased to plaintiff], that a dispute long had existed as to the correct boundary line between their properties and the leased property and that they opposed the erection of a new boundary fence on the disputed boundary line. In opposition to the granting of plaintiff's request for a temporary restraining order and preliminary injunction they maintained: (1) that the plaintiff's complaint did not state a claim upon which relief can be granted since the complaint asked for no final judgment and there is no such thing as an action for a temporary injunction; (2) that the complaint did not state facts sufficient to justify a temporary injunction even if final judgment had been sought for that (a) this is a boundary dispute and injunctive relief is not to be used for awarding possession of disputed property, (b) temporary injunction would be relief as broad as ejectment, (c) plaintiff not attempting to preserve status quo but attempting to erect a fence not previously in existence, and (d) no facts alleged showing irreparable injury; (3) that plaintiff in seeking to erect a new fence was trespassing upon property of the defendants; and (4) that Hal N. Wood, the true owner of the

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property, rather than the plaintiff, was the real party in interest in this action.

On the basis of these pleadings as affidavits and oral arguments of counsel, the trial judge made detailed findings of fact and concluded as a matter of law that the plaintiff was entitled to the relief demanded and that a preliminary injunction should issue. Defendants were ordered to cease and desist from interfering with the plaintiff's use and enjoyment of the leasehold estate and not to remove or cause to be damaged or destroyed any of the fencing or posts erected prior to the hearing. Plaintiff was ordered not to erect any further fencing or posts along the existing fence line nor use any portion of the leasehold estate in dispute. It was stated that the order would continue in full force and effect until the conclusion of a "processing action" between the defendants and Hal N. Wood, the true owner of the property, to determine the correct boundary between their respective properties or until a hearing on a permanent injunction, whichever was sooner. Defendants appealed.

Frederick J. Sternberg for plaintiff appellee.

Dalton and Long, by W. R. Dalton, Jr., for defendant appellants.

MORRIS, Judge.

Defendants except to several of the trial judge's findings of fact and conclusions of law and contend that entry of the order appealed from constitutes error. We find merit in these contentions.

There is absolutely no evidence in the record to support some of the findings of the trial judge. Moreover even without reference to the findings of fact made by the trial judge, the order entered must be vacated.

"The primary purpose of a temporary restraining order is usually to meet an emergency when it appears that any delay would materially affect the rights of a plaintiff." *Register v. Griffin*, 6 N.C. App. 572, 575, 170 S.E. 2d 520 (1969). It is only an ancillary remedy for the purpose of preserving the status quo or restoring a status wrongfully disturbed pending the final determination of the action. *R. R. v. R. R.*, 237 N.C. 88, 74 S.E. 2d 430 (1952), and cases cited. It is not a cause of action or a lawsuit in and of itself. *Lynch v. Snapp*, 350 F. Supp.

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1134, 1140 (W.D.N.C. 1972), rev'd on other grounds, 472 F. 2d 769 (4th Cir. 1973). The assumption is that a plaintiff seeking a temporary restraining order or a preliminary injunction eventually wants permanent relief. North Carolina practice and procedure contemplates that an application for a temporary restraining order will be followed very quickly by notice to the defendant and a hearing on the preliminary injunction motion. After this, it is contemplated that the case finally will be resolved after a full scale hearing. Yet in this case there is no prayer for final relief. Plaintiff's complaint, even as amended, only seeks interim relief. He apparently expects this action to end when the temporary injunction is granted. As we have noted, there has to be an action pending to which the temporary injunction can be ancillary. No such action exists here, and for this reason, among others, we find it was error to enter the order appealed from. The temporary injunction granted in this case cannot be made ancillary to either a processioning proceeding to be brought in the future by a person not a party to this action or a continuance of this action for a permanent injunction when, as here, it is beyond the scope of the pleadings. Both the temporary restraining order and the order granting plaintiff a temporary injunction are vacated.

It appears that defendants by answer moved for dismissal of the action. This motion apparently has not been considered by the court. The matter is remanded for the court's consideration of this motion and entry of an order thereon.

Orders are vacated and the matter remanded.

Chief Judge BROCK and Judge MARTIN concur.

GRAHAM W. DEAN v. CAROLINA COACH COMPANY, INC.

No. 7410SC643

(Filed 6 November 1974)

Evidence § 50— expert medical opinion — incomplete hypothetical question

In an action to recover damages for personal injuries sustained in a collision between plaintiff's automobile and defendant's bus, the trial court erred in allowing an expert witness to answer a hypothetical question concerning plaintiff's injury where the question did not refer to any pre-existing condition aside from the fact that there had been

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a kidney stone operation and a hernia repair, but there was uncontradicted evidence that plaintiff had been to a doctor complaining of pain in the area in question about one month before the collision.

APPEAL by defendant from *McKinnon, Judge*, 18 February 1974 Session of Superior Court held in WAKE County. Heard in the Court of Appeals 25 September 1974.

This is a civil action seeking damages for personal injuries sustained in a collision between an automobile owned and operated by the plaintiff and a bus owned by and being operated on behalf of the defendant. Defendant, on appeal, concedes negligence and appeals only from the award of damages.

Plaintiff's evidence tended to show that he had a kidney stone operation in 1970 from which he was out of work for awhile and that in 1971 he had an operation to repair a hernia or rupture in the scar from the first operation; that he had recovered from these operations so that he was able to carry on his ordinary activities and trade as a bus driver and was generally in good condition prior to the collision; that in the collision he was thrown against the console part of his car and although he did not report any injury to the investigating officer or seek medical attention, by that night he had a swollen ankle, pain in his neck and shoulder and pain in the area where he had the previous operations. Further evidence introduced by the plaintiff tended to show that several months after the collision, one Dr. Webb examined and treated him and determined an operation was necessary for further repairing the area of the original operation; that Dr. Webb further determined plaintiff had a hernia and operated on him and treated him for some time in connection with the operation; that as a result of the collision plaintiff did not work from May until October of 1971 when he finally was permitted to return to work. Other evidence offered by the plaintiff tended to show that during this period during which he was not able to work he lost earnings in the amount of \$6,756.75 and that in January and February of 1972 he again was out of work because of the injuries sustained in the collision for which there was an additional earning loss of some \$1,006.44; that during the time he was not able to work he incurred medical bills, drug bills and expenses from several doctors in the amount of \$1,283.80; that he had some pain and suffering throughout these periods at various times, depending upon his activities, and that he continues to the present time to have some difficulty with his neck and side. At the trial it

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was plaintiff's contention that all of these damages, or a substantial part of them, directly and naturally resulted from the collision and the negligence of the defendant.

Defendant contended that there was a substantial pre-existing injury or condition in the form of an operation which had not been repaired satisfactorily or which had failed to heal properly the first time plaintiff underwent surgery. This evidence tended to show that plaintiff had reported to the doctor a month before the collision that he was having trouble with his side and at that time it was suggested plaintiff wear a corset for support. It was defendant's contention that the evidence offered by the plaintiff did not support a finding that plaintiff's trouble with his side resulted from the collision. Defendant argued that some small amount of damages, consistent with plaintiff's neck and shoulder injuries and his swollen ankle would be adequate compensation and that is all the evidence justifies in this case.

Additional facts necessary for decision are set forth in the opinion.

Teague, Johnson, Patterson, Dilthey and Clay, by Grady S. Patterson, Jr., for plaintiff appellee.

Smith, Anderson, Blount and Mitchell, by Samuel G. Thompson, for defendant appellant.

MORRIS, Judge.

Defendant seeks a new trial on the issue of damages. He concedes that unless his third assignment of error is sustained, he is not entitled to such relief since other alleged errors in the record standing alone would not be sufficient to warrant a new trial.

Defendant's third assignment of error relates to a hypothetical question asked of Dr. Alexander Webb, Jr., one of plaintiff's physicians. The question posed was as follows:

"If the jury should find from the evidence that is the competent evidence, and by its greater weight that on May 13th, 1971, plaintiff Graham W. Dean was employed as a bus operator for defendant Carolina Coach Company and that at said time was able to operate the bus without any pain or difficulty; that prior to May 13th, 1971, he on June 18, 1970, underwent surgery for removal of kidney stones

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and thereafter in February, 1971, another surgical procedure for the repair of a hernia; that he was certified as being able to return to work by Dr. Donald Whitaker on March 31st, 1971, and that he was involved in this accident on May 13th, 1971, and at that time was complaining of no pain and immediately after the accident he had pain in his right ankle, right clavicle area, cervical neck strain and pain in the abdomen in the area of the post-operative area, if the jury should find these facts to be true, do you have an opinion based upon reasonable medical certainty as to whether or not the accident of May 13, 1971, could or might have aggravated the pre-existing condition, that is the pre-existing surgical procedures, could or might have aggravated that condition and resulted in the necessary treatment that you gave him?"

Over objection by the defendant, Dr. Webb was permitted to respond to this question in the affirmative and to express several opinions concerning plaintiff's injuries. Defendant contends this was prejudicial error since Dr. Webb was allowed to express his expert opinions based on an incomplete and factually erroneous hypothetical question. We agree.

It is clear from the testimony of Dr. Whitaker as well as from the testimony of the plaintiff himself that the hernia had re-occurred some 30 days before the accident and was causing the plaintiff sufficient pain for him to seek medical assistance. No mention is made of these facts in the hypothetical question asked of Dr. Webb. This we find to be error.

"It is customary to incorporate in a hypothetical question the relevant facts in evidence which counsel hopes will be accepted as true by the jury, and to ask the witness his opinion based on such facts *if* the jury shall believe them to be facts. In framing a hypothetical question the following cautions should be observed:

1. Include only such facts as are in evidence or such as the jury will be justified in inferring from the evidence. It is not enough that the missing facts are expected to be supplied later.

2. *Include all the material facts which will be necessary to enable the witness to form a satisfactory opinion. Although it is not necessary to incorporate all of the facts, the trial judge may properly exclude the witness's answer if the*

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question presents a picture so incomplete that an opinion based upon it would obviously be unreliable. . . .” (Emphasis supplied.) 1 Stansbury, N. C. Evidence 2d, pp. 451-452, § 137, (Brandis Rev. 1973).

In the case at bar, the hypothetical question was factually erroneous and improper. The question does not refer to any “pre-existing” condition aside from the fact that there had been a kidney stone operation on 18 June 1970, and a hernia repair in February 1971. The other facts presuppose that the plaintiff was having absolutely no problem in the hernia area prior to the accident in spite of the uncontradicted evidence that he went to Dr. Whitaker complaining of pain in this area about one month before the collision. The omission of these facts from the hypothetical question resulted in the presentation of “a picture so incomplete” that an opinion based upon it was misleading to the jury and obviously unreliable. This was prejudicial error.

We find it unnecessary to address ourselves to other assignments of error presented by the defendant since, for the reasons assigned, we conclude he is entitled to a new trial on the issue of damages.

New trial on damages only.

Chief Judge BROCK and Judge MARTIN concur.

Comr. of Insurance v. Automobile Rate Office

STATE OF NORTH CAROLINA, EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA AUTOMOBILE RATE ADMINISTRATIVE OFFICE, NATIONWIDE MUTUAL INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, THE AETNA CASUALTY & SURETY COMPANY, NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, UNITED STATES FIDELITY & GUARANTY COMPANY, IOWA NATIONAL MUTUAL INSURANCE COMPANY, UNIGARD MUTUAL INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY, ST. PAUL FIRE & MARINE INSURANCE COMPANY, SHELBY MUTUAL INSURANCE COMPANY, LIBERTY MUTUAL MARYLAND CASUALTY COMPANY, OHIO CASUALTY INSURANCE COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

No. 7410INS619

(Filed 6 November 1974)

Insurance § 79.1— automobile liability rates—order to disregard age and sex— authority of Insurance Commissioner

The Commissioner of Insurance had no authority to order the establishment of a premium rate classification plan for private passenger automobile liability insurance not based in whole or in part on the age and sex of the drivers since the Commissioner is directed by G.S. 58-248.9 to establish a "260 Plan" rate classification or a modification of that plan, and the age and sex of insured drivers are essential classification criteria for such a plan.

APPEAL by the North Carolina Automobile Rate Administrative Office and member companies of that office from an order of the Commissioner of Insurance filed 21 March 1974. Heard in the Court of Appeals on 25 September 1974.

On 20 November 1973 the Commissioner of Insurance (Commissioner), upon his own motion and upon the petition of Albert Lynn Daniel, issued a notice of public hearing for the purpose of considering "whether classifications for private passenger automobile liability insurance based on the male sex and age of operators or owners of the automobiles insured are unreasonable, unfairly discriminatory, unwarranted, or improper. . . ."

A protest and motion for intervention was filed by the North Carolina Automobile Rate Administrative Office (Rate Office) on 10 December 1973 and by Nationwide Mutual Insurance Company on 11 December 1973. The hearing was com-

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menced on 12 December 1973 and continued on 13 December 1973, 10 and 23 January 1974, and 6, 7, and 22 February 1974.

On 21 March 1974 the Commissioner filed his Decision and Order in this proceeding. After making findings of fact, the Commissioner ordered that "[e]ffective May 1, 1974, no premium rate for private passenger automobile liability insurance sold in this State shall be based in whole or in part on the age and sex of a person insured thereunder." He further directed the Rate Office to file a revised classification system with his office on or before 15 April 1974, which was not to be based on the age and sex of insured drivers.

The Rate Office and member insurance companies, pursuant to G.S. 58-9.4 and G.S. 58-9.5, appealed.

Attorney General James H. Carson, Jr., by Charles A. Lloyd, Assistant Attorney General and Isham B. Hudson, Jr., Staff Attorney for the North Carolina Insurance Department, for the Commissioner of Insurance.

Allen, Steed & Pullen by Arch T. Allen, Thomas W. Steed, Jr., and Lucius W. Pullen; Broughton, Broughton, McConnell & Boxley by John D. McConnell, Jr.; Sanford, Cannon, Adams & McCullough by T. Allen Adams; Young, Moore & Henderson by Charles M. Young, attorneys for defendant appellants.

HEDRICK, Judge.

Our primary concern on this appeal is whether the Commissioner of Insurance has the statutory authority to establish premium rate classifications for the private passenger automobile liability insurance sold in this state without using age and sex as criteria in establishing such classifications.

The only authority the Commissioner has to establish rate classifications is that power which is delegated to him by the Legislature. *Comr. of Insurance v. Automobile Rate Office*, 19 N.C. App. 548, 199 S.E. 2d 479 (1973), cert. denied, 284 N.C. 424, 200 S.E. 2d 663 (1973); Article 25, Chapter 58 of the General Statutes. Of particular importance on this appeal is G.S. 58-248.1, which in pertinent part provides:

"Whenever the Commissioner, upon his own motion or upon petition of any aggrieved party, shall determine, after notice and a hearing, that the rates charged or filed

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on any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory, or otherwise not in the public interest, or that a classification or classification assignment is unwarranted, unreasonable, improper or unfairly discriminatory he shall issue an order to the bureau directing that such rates, classifications or classification assignments be altered or revised in the manner and to the extent stated in such order to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest."

Also of importance is G.S. 58-248.9, which provides as follows:

"The Commissioner of Insurance is directed to establish, or cause to be established, following public hearing, such private passenger vehicle rate classifications, schedules, rules and regulations as may be deemed desirable and equitable to classify drivers of such vehicles for insurance purposes and may likewise, from time to time, withdraw, modify or amend any such classifications, schedules, rules or regulations. The Commissioner is further directed to establish a *260 Plan rate classification or an appropriate modification of that plan, in his discretion.*" [Emphasis added.]

In G.S. 58-248.9 the General Assembly clearly directed the Commissioner to establish or cause to be established a "260" premium rate classification plan or a modification thereof. The discretion given to the Commissioner is applicable only to the type of modification of a "260 Plan." "When the language of a statute is plain and free from ambiguity, expressing a single, definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended, and the statute must be interpreted accordingly." *Davis v. Granite Corporation*, 259 N.C. 672, 675, 131 S.E. 2d 335, 337 (1963). (citations omitted).

The meaning of the term "260 Plan" seems to have been well settled when the General Assembly enacted G.S. 58-248.9 in 1971. It is a premium rate classification plan that has been in existence since 1965 and is well known throughout the automobile insurance industry. The parties are not in dispute as to its meaning. As we can find no legislative intent to the contrary, we will give the term "260 Plan" its established meaning. 7 Strong, N. C. Index 2d, Statutes, § 5; 82 C.J.S., Statutes, § 316(b).

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The "260 Plan," as its name implies, divides insured drivers into 260 premium rate classes. The drivers are grouped by means of such criteria as age, sex, marital status, and use of the automobile. In our opinion the age and sex of insured drivers are essential classification criteria of the "260 Plan," and this is conceded by the Commissioner. The Commissioner also concedes that the revised classification plan he ordered the Rate Office to prepare is not consistent with the "260 Plan" and is not a modification of it. He contends, however, that G.S. 58-248.1 gives him the authority to abolish premium rate classifications based on age and sex and to order the Rate Office to issue revised classifications not based on these criteria if the new classifications are "reasonable, adequate, not unfairly discriminatory, and in the public interest." In view of G.S. 58-248.9 we do not feel the Commissioner has such broad authority to revise premium rate classifications in North Carolina. Furthermore, such an interpretation would raise the serious question of whether the General Assembly improperly delegated its legislative authority to the Commissioner. See *Comr. of Insurance v. Automobile Rate Office, supra*. Consequently, by ordering the establishment of a premium rate classification plan not based in whole or in part on the age and sex of drivers, the Commissioner has exceeded the authority delegated to him by the Legislature. The order appealed from is

Reversed.

Judges MORRIS and BAILEY concur.

STATE OF NORTH CAROLINA v. WALTER JACOB DEBNAM, JR.

No. 7410SC598

(Filed 6 November 1974)

Criminal Law § 143— revocation of suspension — independent judgment of trial court as basis

The trial judge could properly activate a suspended sentence on his own independent judgment by reason of certain conduct where the solicitor had entered *nolle prosequis* on charges resulting from the same conduct.

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APPEAL by defendant from *McLelland, Judge*, 20 May 1974 Session of WAKE Superior Court. Heard in Court of Appeals 23 September 1974.

The record shows that on 28 June 1973, the defendant pleaded guilty to the charges of driving under the influence of intoxicating liquor and transporting alcoholic beverages with the seal broken in a motor vehicle. Defendant received a six months sentence which was suspended for two years on the condition that defendant (1) pay a fine of \$210 and costs and (2) surrender his operator's license and not operate a motor vehicle on the highways of North Carolina for two years. On 5 October 1973, district court Judge Preston entered an order granting the State's motion to activate the suspended sentence due to alleged violations of its conditions. Defendant obtained a trial *de novo* in superior court. After a hearing in superior court, the trial judge found from the evidence that defendant had wilfully failed to surrender his driver's license and operated a motor vehicle on 19 July 1973 within the two year period of the suspended sentence. From an order of the superior court revoking the suspended sentence, defendant appealed.

Attorney General Carson, by Associate Attorney James Wallace, Jr., for the State.

Malcolm B. Grandy, for defendant appellant.

MARTIN, Judge.

Defendant asserts that the trial court activated his suspended sentence upon the same conduct which the solicitor had entered *nolle prosequis*. Defendant states in his brief, "Thereupon, both 73 CR 46249 and 73 CR 46250 which encompassed all of the alleged actions of the defendant upon which the order of revocation of suspended sentences was based were (at the election of the District Attorney) terminated in favor of the defendant appellant by an order signed by J. McLelland on January 10, 1974, wherein both cases were nol-prossed without leave, which is tantamount to an acquittal."

"When a jury or other tribunal having jurisdiction acquits a defendant of a criminal charge, it is clear that the same charge may not be the basis for invoking a previously suspended sentence. Likewise, a revocation of suspension cannot be bottomed solely upon a pending criminal charge; a

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conviction or a plea of guilty is required. (Citations.)" *State v. Causby*, 269 N.C. 747, 153 S.E. 2d 467 (1967).

Furthermore, revocation of a suspended sentence cannot be based solely on a plea of *nolo contendere* in a prior criminal action. *State v. Thomas*, 236 N.C. 196, 72 S.E. 2d 525 (1952).

Defendant equates a *nolle prosequi* with an acquittal and then attempts to come within the above rules. Defendant cites *State v. Guffey*, 253 N.C. 43, 116 S.E. 2d 148 (1960), where the Court held, in effect, that a suspended sentence could not be activated *solely* on the basis of a conviction where the North Carolina Supreme Court subsequently determined that the conviction was based on insufficient evidence. However, the Court in *Guffey* carefully pointed out that the superior court judge did not activate the suspended sentence on his own independent judgment; instead, the superior court judge merely affirmed the order of a recorder's court, which had activated the suspended sentence. In the case at bar, the superior court judge heard testimony from four witnesses and concluded that defendant violated valid conditions of the suspended sentence. Thus, it is clear that the trial court's judgment was an independent one and not based upon the charges which the solicitor had *not* *prossed*.

The issue now becomes whether the trial judge could activate a suspended sentence on his own independent judgment by reason of certain conduct where the solicitor had entered *nolle prosequis* on charges resulting from the same conduct. We conclude that the trial judge could. In *State v. Greer*, 173 N.C. 759, 92 S.E. 147 (1917), the defendant was first convicted of retailing intoxicating liquors and received a suspended sentence on the condition that defendant should not violate the prohibition laws of North Carolina. A short time later, the defendant in *Greer* was adjudged guilty in municipal court of retailing liquor to one Millard Creech, and the judge activated the suspended sentence of the first case. Defendant appealed the second case to superior court and was found not guilty by a jury, but the municipal court judge refused to revoke his order activating the suspended sentence. The court in *Greer* said, at page 760, "The verdict of the jury acquitting the defendant of the sale to Millard Creech was not binding on the judge of the municipal court. It was his right to find the facts in respect to that matter according to his own convictions upon the evidence before him, and not according to the evidence before the

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jury in Superior Court." It may not be desirable for a judge to activate a suspended sentence upon conduct where a jury has found the defendant not guilty of a charge arising out of that conduct, but it appears to be within the power of the judge to do so. It follows from the foregoing, that the trial judge in the case at bar could activate a suspended sentence on his independent judgment where the solicitor had *not prossed* charges arising from the same conduct. But see *State v. Causby*, 269 N.C. 747, 153 S.E. 2d 467 (1967).

"Probation or suspension of sentence comes as an act of grace to one convicted of crime. . . ." *State v. Boggs*, 16 N.C. App. 403, 192 S.E. 2d 29 (1972). In revoking a suspended sentence:

"All that is required in a hearing of this character is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. Judicial discretion implies conscientious judgment, not arbitrary or willful action. It takes account of the law and the particular circumstances of the case, and 'is directed by the reason and conscience of the judge to a just result.' (Citations)." *State v. Hewett*, 270 N.C. 348, 154 S.E. 2d 476 (1967).

The order of the trial court is affirmed.

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

WILLIAM T. BENSON v. COASTAL PLAIN LIFE INSURANCE
COMPANY

No. 7418DC459

(Filed 6 November 1974)

1. Trial § 40— consent to issue — waiver of objection

Defendant cannot complain of an issue which he agreed could be submitted to the jury.

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2. Insurance § 14— life insurance — double indemnity — intoxication — causal relation to death — instructions

In an action to recover under double indemnity provision of a life insurance policy, the trial court should have charged the jury that a provision excluding such coverage for a death resulting from "injuries sustained by the insured while intoxicated" would preclude liability even though there was no causal relation between the intoxication and death.

APPEAL by defendant from *Haworth, District Judge*, 12 November 1973 Session of GUILFORD County District Court. Argued in the Court of Appeals on 26 August 1974.

Plaintiff brought this action to recover \$2,000.00 allegedly owed to plaintiff-beneficiary on the basis of a life insurance contract between the insured, Carrie Benson, and defendant.

The policy provides that defendant will pay the named beneficiary \$1000.00 upon proof of the insured's death. Additionally, it provides that in the event of death by accidental means the defendant will pay an amount equal to twice the amount then payable at death. According to the policy, this provision for an additional amount does not cover:

"death (1) occurring (sic) while any premium on this policy is in default beyond the grace period, (2) occurring (sic) before the Insured attains age 1 or after he attains age 70, (3) occurring (sic) more than ninety days after the bodily injuries were sustained, (4) resulting from injury sustained before the date of issue of this policy, (5) resulting from suicide while sane or insane, (6) resulting from participation in an assault, riot or felony, (7) resulting directly or indirectly from, or contributed to by bodily or mental infirmities or disease in any form, or from medical or surgical treatment thereof, (8) resulting from operating or riding in or descending from any kind of aircraft, if the Insured is a pilot, officer, or member of the crew of such aircraft or is giving or receiving any kind of training or instruction or has any duties aboard such aircraft or duties requiring descent therefrom, or (9) resulting from insurrection or war, declared or undeclared, or any act attributable thereto, whether or not the Insured is in military or naval service, (10) injuries sustained by the Insured while intoxicated."

The parties stipulated that the policy was in full force on the date of the insured's death and that defendant had paid

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\$1000.00 with interest to plaintiff without prejudice to plaintiff's claim for an additional \$1000.00. Defendant's evidence indicated the following things. On 23 April 1972, a fire occurred at the home of the insured resulting in the death of the insured due to smoke inhalation. A sample of the insured's blood indicated a .19% alcohol content. Defendant's motion for a directed verdict at the close of all the evidence was denied.

The jury answered the questions submitted by the trial judge as follows:

"1. Did the death of Carrie Lee Benson on April 23, 1972, result directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental means?

Answer: Yes.

2. Was Carrie Lee Benson, at the time of her death, on April 23, 1972, intoxicated?

Answer: Yes.

3. If Carrie Lee Benson was intoxicated at the time of her death, did such condition exclude her beneficiary from recovering the accidental death benefits set out in insurance policy #1304876, issued to the deceased by the defendant?

Answer: No.

4. Is the plaintiff entitled to recover \$1000.00 or \$2000.00 from the defendant?

Answer: \$2000.00."

Defendant's motion for judgment notwithstanding the verdict was denied.

Clark, Tanner & Williams, by W. Fred Williams, Jr., for plaintiff appellee.

Battle, Winslow, Scott & Wiley, by Robert L. Spencer, for defendant appellant.

MARTIN, Judge.

[1] Defendant argues the trial court erred in submitting question three to the jury. However, the record shows the trial court merely submitted issues to the jury to which both parties

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had agreed. An objection and exception to the form of an issue or to its submission to the jury comes too late when taken after the jury has rendered its verdict upon the issue. *Yandle v. Yandle*, 17 N.C. App. 294, 193 S.E. 2d 768 (1973). Not only did defendant *not* object to the issue under consideration, he, in fact, agreed to it. Defendant will not be heard to complain now. *Duke v. Insurance Co.*, 22 N.C. App. 392, 206 S.E. 2d 796 (1974).

[2] However, we are of the opinion that the trial court committed prejudicial error in its application of the law to the facts. Even though a party is bound by his consent to the submission of an issue, he is entitled to a correct charge thereon. *Duke v. Insurance Co.*, *supra*. While the trial court instructed the jury with regard to the interpretation of an insurance contract, there is no mention of the effect of an exclusionary clause upon the liability of an insurer. In *Ritchie v. Travelers Protective Association*, 203 N.C. 721, 166 S.E. 893 (1932), the Court interpreted language precluding coverage "when or while a member is in any degree under the influence of intoxicating liquor or liquors or of any narcotic or narcotics. . . ." The Court held that such language precluded liability of the insurance company even though intoxication was not causally connected to the injury. "As to whether there must be a causal connection between the insured's injury or death and the intoxication, the courts have held with practical unanimity that wherever the insurer is released from liability in cases of injury or death 'while' intoxicated . . . the insurer is exonerated if injury or death occurs while the insured occupies the forbidden status. In other words, no causal relation between the two events need be shown." 44 Am. Jur. 2d, Insurance, § 1290, p. 138.

Defendant is entitled to a new trial. Since there must be a new trial, we call attention to the following statement. "As a general rule, the construction and effect of a written contract of insurance is a matter of law, to be determined by the court and not by the jury, where there is no occasion to resort to extrinsic evidence for the purpose of resolving an ambiguity." 1 Couch on Insurance 2d, § 15:3, p. 638-639.

New trial.

Chief Judge BROCK and Judge MORRIS concur.

State v. Mills

STATE OF NORTH CAROLINA v. BOBBY LEE MILLS, DEFENDANT,
AND DAVID CLOSS WINSTEAD, SURETY

No. 749SC742

(Filed 6 November 1974)

1. Arrest and Bail § 11— appearance bond — special court session — forfeiture

An appearance bond which stated that "This is a continuing bond from Court to Court, day to day and session to session . . . until final judgment is entered in the trial divisions of the General Court of Justice, and not to depart the court without leave . . ." was broad enough to render defendant surety indebted to the State when defendant principal failed to appear at a special session of court at which his case was calendared, even though the surety was not given notice of the special session.

2. Arrest and Bail § 11— appearance bond — arrest of nonappearing defendant — forfeiture required

Since, under G.S. 15-122 the surrender of a principal after recognition has been forfeited does not result in a discharge of the surety's obligation but the forfeiture must be remitted in the manner provided for, the trial court did not err in ordering that the State recover from defendant surety on an appearance bond, even though defendant principal was taken into custody two months after he failed to appear in court.

APPEAL by Winstead from *Bailey, Judge*, 29 April 1974 Criminal Session of FRANKLIN County Superior Court. Argued in the Court of Appeals 14 October 1974.

Winstead, as surety, and defendant Mills, as principal, entered into an appearance bond in the amount of \$10,000 which provided in part that:

"This is a continuing bond from Court to Court, day to day and session to session in the trial divisions of the General Court of Justice, and THE CONDITION OF THIS OBLIGATION IS SUCH, that if the defendant shall appear before the District Court at Louisburg, North Carolina, on 12 day of February, 1973 . . . and return for trial from day to day and session to session, until final judgment is entered in the trial divisions of the General Court of Justice, and not depart the court without leave, then this obligation to be void; otherwise to remain in full force and effect."

At the August 1973 Session of Franklin County Superior Court, defendant Mills was tried before a jury, but the trial judge

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withdrew a juror and declared a mistrial. On 28 January 1974, by order of the Chief Justice of North Carolina, a special session of Superior Court for Franklin County began. At this special session defendant Mills' name was called in open court and Mills failed to answer, whereupon judgment *nisi* was entered against defendant Mills and Winstead for the full \$10,000 obligation. After judgment *nisi*, notice of a hearing was given to Winstead, as surety. Pursuant to the hearing, the trial judge ordered that the State recover from defendant Mills and Winstead, surety, jointly and severally, \$5,000 along with cost. From this order Winstead appealed.

Attorney General Carson, by Assistant Attorney General Raymond W. Dew, Jr., and Associate Attorney John R. Morgan, for the State.

E. F. Yarborough and B. N. Williamson III, by E. F. Yarborough, for appellant.

MARTIN, Judge.

The surety on this appearance bond, Winstead, assigns as error the entry and signing of the judgment. An exception to the judgment or to the signing of the judgment presents the face of the record proper for review, and review is limited to the questions whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment, and whether the judgment is regular in form. 1 Strong, N. C. Index, 2d, Appeal and Error, § 26.

The trial judge found the following facts concerning the special session of court from which defendant Mills was absent: A local radio station announced that a special session of criminal court would convene on 28 January 1974; a court calendar was prepared with defendant Mills' name appearing thereon; a subpoena was issued for defendant Mills on 25 January 1974 and was returned by the Sheriff marked "not to be found in Franklin County"; a copy of the calendar was regularly mailed to Mills' attorney of record; finally, an agent of the State Bureau of Investigation personally notified defendant Mills that the trial was set for 28 January 1974.

[1] Winstead argues that, while he was bound as surety to secure the appearance of defendant Mills at a regular session of court, he was not under a duty to secure the appearance of Mills at a special session of court of which he, Winstead, had

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no notice. The surety Winstead has not shown us any North Carolina law which requires that the surety be given notice of the principal's trial dates. Instead, he says that *State v. Horton*, 123 N.C. 695, 31 S.E. 218 (1898) is no longer a precedent for this Court since it was decided under Code § 919, and this provision no longer appears in the General Statutes. In *State v. Horton*, *supra*, the Court held that where a defendant gave bond to appear at a regular term which was not held by reason of the judge's illness, then such defendant is responsible on his bond for his appearance at a special term of court. We do not decide whether *State v. Horton* depends upon the provisions of Code § 919 (now repealed). The appearance bond under consideration reads in part, "This is a continuing bond from Court to Court, day to day and session to session . . . until final judgment is entered in the trial divisions of the General Court of Justice, and not to depart the court without leave. . . ." We think that such an appearance bond is broad enough to cover special sessions. When defendant Mills failed to appear at the special session of court, Winstead, as surety, became indebted to the State subject to relief under G.S. 15-116. The order of Judge Bailey which lessened the forfeited indebtedness from \$10,000 to \$5,000 was a matter within his discretion. See *State v. Hawkins*, 14 N.C. App. 129, 187 S.E. 2d 417 (1972).

[2] Defendant Winstead further contends that he was prevented from surrendering the principal to the sheriff after judgment *nisi* on 28 January 1974, and thereby gaining a discharge under N.C.G.S. 15-122, because the principal was taken into custody and confined in Wake County Jail on 25 March 1974, approximately two months after Mills failed to appear in court. Defendant recognizes that under G.S. 15-122, the surrender of a principal after recognizance has been forfeited does not result in a discharge in a criminal case as it does in a civil case. In a criminal proceeding, there is no discharge of the surety's obligation, but "the forfeiture may be remitted in the manner provided for." Defendant argues there is no reasonable basis for such a distinction between civil and criminal proceedings, and therefore G.S. 15-122, as applied to him, is unconstitutional. We disagree. Certainly, the State has a greater interest in seeing that a party to a criminal proceeding, in comparison to a civil proceeding, attends that proceeding. It follows that the State would be justified to scrutinize the discharge of a surety in a criminal proceeding more closely than a surety in a civil proceeding. The trial judge acted within his discretion

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in reducing the forfeiture to \$5,000 under G.S. 15-116, and we find no error of law on the face of the record.

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

BILL CLEMONS v. CARLYLE LEWIS

No. 7413DC562

(Filed 6 November 1974)

1. Trial § 16— motion to strike granted — motion for mistrial properly denied

In an action to recover \$1500 which plaintiff allegedly loaned to defendant, the trial court did not err in denying plaintiff's motions for mistrial where the defendant and defense counsel commented that plaintiff was in jail on the day before the loan was allegedly made, plaintiff moved to strike that testimony, and the trial court instructed the jury to disregard the testimony.

2. Trial § 38— instructions — request properly denied

A refusal of a requested charge is not error where the instructions which are given fully and fairly present every phase of the controversy.

APPEAL by plaintiff from *Walton, Judge*, 5 November 1973 Session of District Court held in COLUMBUS County. Heard in the Court of Appeals 18 September 1974.

On 20 December 1972 plaintiff instituted this action to recover a sum of money, \$1,500.00, which he allegedly loaned to the defendant. Plaintiff is in the "farming, trucking, combining and commercial work businesses—commercial work being the harvesting of soybeans for other people." Plaintiff testified that on 4 December 1972 defendant asked him for a loan of \$1,500.00, and plaintiff gave defendant fifteen one hundred dollar bills which he took from his wallet. Plaintiff alleges that as a part of the consideration for the loan, the defendant agreed to let the plaintiff harvest his soybean crop. Plaintiff stated that he had \$2,800.00 in cash and checks in his wallet that day. He often carried large sums of money "because I have trucks on the road which may need money when the banks are closed. I wire the money by Western Union for these tractor-trailer trucks when

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needed." The loan to defendant was interest-free. Plaintiff testified that he planned to recover the \$1,500.00 when he harvested the defendant's soybeans. Plaintiff stated that he knew he could recover his loan from the proceeds of the sale of the defendant's crop because he had cut the defendant's crop in the past and was familiar with it. After he loaned the money to the defendant, plaintiff told his son, Russell Clemons, and one of his employees, Thomas Jefferson, to be sure to take his money out of the proceeds of the sale of the soybeans when they harvested the beans and transported them to market. Plaintiff alleges the defendant breached the agreement when he harvested his own beans and when he refused to repay the loan. Russell Clemons and Thomas Jefferson both testified that plaintiff told them to take \$1,500.00 out of the defendant's crop; however, neither witnessed the loan. There is no instrument evidencing the loan agreement.

Defendant testified that he planted twenty-two acres of soybeans. Ten acres belonged to him while twelve acres belonged to his father. Defendant stated that on 4 December 1972 he asked Russell Clemons to cut his beans as soon as possible. On 20 December 1972 the defendant decided to cut his own soybeans. While the defendant was harvesting his beans, the plaintiff appeared and asked the defendant to repay the loan. This was defendant's first contact with the plaintiff concerning the loan. The defendant testified that he sold his ten acres of soybeans for \$437.00.

The jury for its verdict found that plaintiff did not lend money to defendant. Plaintiff appealed.

Ralph G. Jorgensen, for the plaintiff.

No counsel contra.

BROCK, Chief Judge.

[1] The plaintiff contends the trial court committed error when it twice failed to grant the plaintiff's motions for a mistrial. Both the defendant and the defense counsel commented that the plaintiff was in jail on 3 December 1972. This was irrelevant to the subject matter of the action, and plaintiff correctly made motions to strike this testimony. The trial judge properly instructed the jury to disregard this testimony, but declined to grant plaintiff's motions for a mistrial. The plaintiff asserts that *Barbour v. Lewpage Corp.*, 20 N.C. App. 271, 201 S.E.

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2d 221, supports his contention that the motions for a mistrial should have been granted. However, that case turned on the trial judge's *failure* to instruct the jury to disregard a prejudicial and incompetent remark. In 2 McIntosh, N. C. Practice 2d, § 1548, it is said:

"The causes for which a mistrial may be ordered are varied and within the discretion of the court. It may be necessary on account of the sickness or other disability of the judge, juror, parties or counsel; or it may be necessary to prevent injustice, as where a party is taken by surprise after the trial has begun, or it is discovered that a juror is disqualified or there has been an improper remark or expression of opinion by the court, or abuse of privilege by counsel, or some misconduct on the part of the jurors or others, or when the jury fails to agree upon a verdict after reasonable time for deliberation."

The exercise of discretion is to be determined by a sound and enlightened judgment, and courts will not interfere unless discretion is abused. *Hensley v. Furniture Co.*, 164 N.C. 148, 80 S.E. 154 (1913). In the case at bar no abuse of discretion appears. Plaintiff's first assignment of error is overruled.

Plaintiff argues that the trial judge committed error when he charged the jury:

"[W]hen one person loans to another a sum of money on condition that it is to be repaid, that amounts to what is known in law as a contract. A contract is an agreement between two or more parties on sufficient consideration to do or to refrain from doing a particular act. In order to constitute a valid contract, there must be an agreement of the parties upon the essential terms of the contract, definite within themselves or capable of being made definite, there must be an offer and an acceptance, a meeting of the minds; competent adults have the right to make any contract they want to make which is not contrary to law or public policy and the Court will not inquire as to whether it was a good contract or a bad one.

"If one party loans to another a sum of money and the other party promises to repay that sum of money, the promise to repay is sufficient consideration to make the contract binding. I also charge you, Ladies and Gentlemen

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of the Jury, that a contract to loan money or a promise to repay a loan is not required to be in writing.”

At oral argument the plaintiff's counsel conceded that the charge was correct but argued that the charge confused the jury. This assignment of error is wholly without merit.

[2] Finally the plaintiff contends that the trial court committed error when it failed to give a *falsus in uno falsus in omnibus* charge requested by the plaintiff. There is no authority in North Carolina supporting the plaintiff's contention. It is well settled that a refusal of a requested charge is not error where the instructions which are given fully and fairly present every phase of the controversy. *Muse v. Seaboard Air Line Railway Company*, 149 N.C. 443, 63 S.E. 102, 19 L.R.A. (N.S.) 453 (1908). This assignment of error is overruled.

It is our opinion that plaintiff had a fair trial free from prejudicial error.

No error.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. WELDON R. CRABTREE

No. 7414SC699

(Filed 6 November 1974)

Automobiles § 117— failure to reduce speed — definiteness of statute

Provisions of G.S. 20-141(c) requiring a motorist to reduce speed in certain situations even though he is traveling within the posted limits is not so vague and indefinite as to be constitutionally invalid.

APPEAL by defendant from *Chess, Special Judge*, 2 May 1974 Session of Superior Court held in DURHAM County. Heard in the Court of Appeals 24 September 1974.

This is a criminal action in which the defendant was charged with unlawfully and wilfully operating a motor vehicle on a public street or highway without decreasing speed to avoid colliding with another vehicle in violation of G.S. 20-141(c). From a jury verdict of guilty and a judgment ordering the payment of court costs, the defendant appealed.

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The State's evidence tended to show that on 13 January 1974, at or about 2:30 p.m., George E. Jenkins was driving his Fiat automobile in a northerly direction on Roxboro Road, U.S. 501, towards Bahama; that he had stopped his automobile for a traffic light at the intersection of Roxboro Road and Latta Road; that when the light changed, he began proceeding through the intersection but as he was going from second gear to third gear he was struck in the right rear by defendant's automobile; that the impact caused the seats in Jenkins's automobile to come loose from the floor and the automobile travelled some distance from the point of the collision before it came to a stop.

Further evidence was offered by the State tending to show that this was a 55 mile-per-hour speed zone and that for a distance of three to five hundred yards from the intersection, and beyond the intersection up to the point where the accident occurred, the view was clear and unobstructed.

The defendant's evidence tended to show that he was operating his automobile at approximately 40 miles per hour at the time of the accident; that as he approached the intersection he observed the Jenkins automobile but that he saw the light was green and thought the Jenkins automobile was moving since neither signal nor brake lights were on; that as he got about ten car lengths from the Jenkins automobile he realized it was not moving and tried to change lanes but because there was another automobile already in the other lane, he was unable to avoid striking the Jenkins automobile in the rear. Other evidence of the defendant tended to show that he stopped his automobile within eight to ten feet from the point of the collision and that the Jenkins automobile also traveled about ten feet after the impact but then "it took off" for some distance, leading defendant to believe plaintiff was driving off.

Additional facts necessary for decision are set forth in the opinion.

Attorney General Carson, by Assistant Attorney General Boylan, for the State.

Blackwell M. Brogden for defendant appellant.

MORRIS, Judge.

Defendant's first assignment of error relates to the overruling of his motions to quash the warrant and the denial of

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his motion in arrest of judgment. It is defendant's contention that G.S. 20-141(c) forbids or requires conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. He maintains that the statute is too indefinite to be constitutionally valid because it does not charge a criminal offense as provided by law, and does not set out any standard from which one can determine whether one is violating the law. We disagree.

G.S. 20-141(c) reads as follows:

"The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway, and to avoid causing injury to any person or property either on or off the highway, in compliance with legal requirements and the duty of all persons to use due care."

After carefully reviewing the language of this statute we are of the opinion, and so hold, that G.S. 20-141(c) is not so vague and indefinite as to be constitutionally infirm. When measured by the specificity of other traffic safety statutes which have been upheld by the appellate courts of this State, G.S. 20-141(c) does not fail the test. G.S. 20-140, our reckless driving statute, for example, has been considered on appeal on many occasions. E.g., *State v. Colson*, 262 N.C. 506, 138 S.E. 2d 121 (1964); *State v. Dupree*, 264 N.C. 463, 142 S.E. 2d 5 (1965); *State v. Weston*, 273 N.C. 275, 159 S.E. 2d 883 (1968). In pertinent part, that statute provides:

"(a) Any person who drives any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others shall be guilty of reckless driving.

(b) Any person who drives any vehicle upon a highway without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving."

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We conclude that the standards of G.S. 20-140(b) which merely require an absence of "due caution and circumspection" and vehicle operation "at a speed or in a manner so as to endanger any person or property" are even less definite than G.S. 20-141 and yet we are of the opinion that such standards are necessary in both statutes to insure needed flexibility. To require the penal traffic draftsman to design a statute with a fixed criminal standard to cover all possible contingencies would place on him an insurmountable burden. For these reasons, and in light of *State v. Bennor*, 6 N.C. App. 188, 169 S.E. 2d 393 (1969), which upheld G.S. 20-141 as constitutional, although involving a different subsection of the statute, defendant's first assignment of error is overruled.

Defendant next contends that the trial court committed error in the charge to such an extent that the language used failed to apply the law to the facts of the case as required by G.S. 1-180. We find his argument unpersuasive. The trial judge's charge was free from prejudicial error.

No error.

Judges HEDRICK and BALEY concur.

RICHARD CLIFTON ROSE v. EPLEY MOTOR SALES AND JEROME EPLEY

No. 7425DC617

(Filed 6 November 1974)

1. Uniform Commercial Code § 15— implied warranty of merchantability — proof of breach

In order to establish a claim for relief under the implied warranty of merchantability of G.S. 25-2-314, plaintiff must prove (1) that a merchant sold goods, (2) which were not merchantable at the time of sale, and (3) injury and damages to plaintiff or his property (4) caused proximately by the defective nature of the goods, and (5) notice to the seller of injury.

2. Uniform Commercial Code § 15— warranty of merchantability — car catching fire — absence of proof of cause of fire

Plaintiff's evidence was insufficient to establish a claim for relief under an implied warranty of merchantability of a car purchased from defendant where it tended to show only that after three hours of operation the car caught fire in the engine compartment and was

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destroyed, but there was no evidence of a defect in the car or of the cause of the fire. G.S. 25-2-314.

3. Uniform Commercial Code § 15— warranty of fitness — car catching fire

Evidence that the engine of a car purchased by plaintiff caught fire after three hours of operation was insufficient to establish a claim for relief under the implied warranty of fitness of G.S. 25-2-315.

APPEAL by defendants from *Dale, District Judge*, 8 April 1974 Session of BURKE County, the General Court of Justice, District Court Division. Heard in the Court of Appeals 23 October 1974.

The plaintiff asserts in his complaint that on 6 November 1973, he bought a used Volkswagen from Epley Motor Sales; that the defendant impliedly warranted the merchantability and fitness of the car under G.S. 25-2-314 and 25-2-315; that the automobile, after three hours of normal operation, caught fire in the engine compartment and was completely destroyed; that the plaintiff thereafter offered to rescind the contract of sale, but was refused; and that as a consequence of the defendants' breach of his implied warranty, the plaintiff has been damaged in the amount of \$1,020.00, plus interest.

The defendants answered through a motion seeking dismissal of the action for failure to state a claim for relief upon which a judgment could be entered. Specifically, the defendants contend that the car was sold "as is," which disclaims any implied warranties on their part. They also assert that there is no allegation of a defect in the car's mechanism, only that a fire has substantially destroyed the vehicle. On the motion to dismiss it was the plaintiff's contention that it was not incumbent upon him to prove who or what caused the fire; that it just smacked of injustice to drive a recently acquired car for three hours or one hundred miles and have it burn up. After argument, the defendants' motion was denied.

The plaintiff-buyer testified that he test drove the car before he eventually bought it around noon on 6 November 1973. He then drove it to the license bureau and to a filling station where he purchased some gas and had the oil checked. He then drove toward Marion and testified as to how well the car operated. As he crossed Highway #126 in McDowell County, the car made a funny racket, whereupon blue smoke started coming out of the back end of the car. The car then proceeded to

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burn up. He testified on cross-examination that he had no idea what happened to cause the fire. The next day, he sought to rescind the contract but was unsuccessful. This being the plaintiff's entire case, the defendants made a motion for directed verdict which was denied. After all the evidence, this motion was renewed and again denied. Thereafter, plaintiff's motion for directed verdict was allowed.

From judgment awarding the plaintiff the full purchase price and costs, the defendants appeal.

Robert E. Hodges for plaintiff appellee.

Byrd, Byrd, Ervin & Blanton by Robert B. Byrd and Joe K. Byrd, Jr., for defendant appellants.

CAMPBELL, Judge.

The defendant contends that the trial court erred in denying defendants' motion for directed verdict at the end of all the evidence.

"The motion for a directed verdict under Rule 50(a) presents substantially the same question as that formerly presented by a motion for judgment of involuntary nonsuit The motion for judgment of involuntary nonsuit . . . presented a question of law for decision by the court, namely, whether the evidence was sufficient to entitle the plaintiff to have the jury pass on it. [Citations omitted.] The same question of law is now presented by a motion for a directed verdict under Rule 50(a)." *Kelly v. Harvester Co.*, 278 N.C. 153, 157, 179 S.E. 2d 396, 398 (1971).

[1] To establish a cause of action "[u]nder 2-314, a plaintiff must prove (1) that a merchant sold goods, (2) which were not 'merchantable' at the time of sale, and (3) injury and damages to the plaintiff or his property (4) caused proximately and in fact by the defective nature of the goods, and (5) notice to seller of injury." White and Summers, Uniform Commercial Code, § 9-6, at 286 (1972).

"Regardless of the ground on which it is sought to hold a . . . seller . . . liable for injury allegedly caused thereby, it is of course necessary that it be established that the product in question actually was defective, deleterious, or otherwise harmful in the respect claimed.

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* * * *

The defectiveness of the product is not shown by proof of nothing more than that the product was involved in an accident." 1 R. Anderson, Uniform Commercial Code, § 2-314:8, at 531 (2d Ed. 1970).

We believe that the above authority properly sets forth the proof required in North Carolina to establish a claim for relief under G.S. 25-2-314. The Uniform Commercial Code in this respect accords with prior decisions of the North Carolina Court. *Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E. 2d 161 (1972); *Aldridge Motors, Inc. v. Alexander*, 217 N.C. 750, 9 S.E. 2d 469 (1940).

[2] In the case at bar, the plaintiff offered absolutely no evidence of a defect in the Volkswagen or of the cause of the fire, the presence of defectiveness and causation being left to complete conjecture. As mentioned above, the plaintiff must offer some evidence that the fire was caused proximately by the defective nature of the automobile. Absolute certainty or positive proof of causation is not required and may even be established by circumstantial evidence, but the evidence must be such that there is a reasonable likelihood or probability of the occurrence and not merely a possibility. Taking the facts in the light most favorable to the plaintiff, a jury would be left to speculate as to the cause of the fire and could not reasonably infer that a defect in the automobile caused the fire. Consequently, we find that the plaintiff has failed to sustain his burden in proving the essential elements of his cause of action and that the trial court was in error in not granting defendants' motion for directed verdict.

[3] We take note that the plaintiff also alleged breach of implied warranty of fitness arising under G.S. 25-2-315. This warranty, however, is even more specific than that in G.S. 25-2-314 and normally only arises in very special circumstances where a buyer purchases goods that have to be specially selected for his particular use. We find no circumstances in this case giving rise to such a cause of action, particularly where we have already found insufficient proof to sustain a cause of action under G.S. 25-2-314.

In view of the foregoing, we find no need to discuss the appellants' remaining assignments of error and reverse the trial court in denying the defendants' motion for directed verdict.

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Reversed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. W. L. MONTIETH

No. 7430SC611

(Filed 6 November 1974)

1. Criminal Law § 66— illegal lineup — independent origin of in-court identification

The *voir dire* evidence supported the trial court's determination that a robbery victim's in-court identification of defendant was of independent origin and not tainted by an illegal pretrial lineup identification where the victim testified that the robbery occurred at a store during daylight, that visibility in the store was good, that he and defendant were within three or four feet of the glass front of the store, that he and defendant stood looking at each other for a couple of minutes while they were facing each other eight or ten feet apart, that he carefully studied the robber's features, and that he based his identification entirely on the facial features he observed at the time of the robbery.

2. Criminal Law §§ 114, 168— statement that State's evidence "does show" — harmless error

The trial court's slip of the tongue in stating that the State further offered evidence tending to show "and does show" did not constitute prejudicial error where the court stated in other portions of the charge that the State had offered evidence tending to show and which the State "contends does show," and where the court charged that it was for the jury to determine what the evidence does show.

APPEAL by defendant from *Jackson, Judge*, April 1974 Session of Superior Court held in CHEROKEE County.

Criminal prosecution for armed robbery. Defendant was found guilty, and from judgment imposing a prison sentence, appealed.

Attorney General James H. Carson, Jr. by Assistant Attorney General William F. O'Connell for the State.

C. E. Hyde for defendant appellant.

PARKER, Judge.

[1] On the afternoon of 1 December 1973 Olin McAllister, operator of a country store in Cherokee County, N. C., was

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robbed by a man carrying a high-powered rifle. A few hours later defendant was arrested at his home in Georgia and was charged with the robbery. About 9:00 p.m. on the same date he was placed in a lineup with three other men at the police station in McCaysville, Georgia. Defendant did not have counsel at the time and had not been advised of his right to counsel or of any other rights. At the lineup McAllister identified defendant as the robber. At defendant's trial on 1 April 1974 defendant's counsel in apt time moved to suppress McAllister's testimony, and the denial of this motion is the subject of defendant's first assignment of error.

"It is well established that the primary illegality of an out-of-court identification will render inadmissible the in-court identification unless it is first determined on voir dire that the in-court identification is of independent origin." *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974). Here, prior to admitting the in-court identification testimony of McAllister, the trial judge held a voir dire hearing on defendant's motion to suppress. On completion of this hearing the judge made findings that "the identification of the defendant by the witness is based upon witness McAllister having seen the defendant in the store at which time he observed the defendant for a couple of minutes," and that "from evidence clear and convicting [sic], there was no impermissibly suggestive procedures to aid or taint the witness's identification of the defendant and the witness McAllister's in-court identification is independent in origin and is admissible in evidence."

Where such findings are supported by competent evidence, they are conclusive on appellate courts. *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974). Here, there was ample competent evidence to support the court's finding that McAllister's identification was independent in origin of anything which occurred at the lineup and that it was based on his having seen the defendant in the store. The robbery occurred during daylight. McAllister testified at the voir dire hearing that visibility in the store was good, that he and defendant were within three or four feet of the glass front of the store, that the sun shines in there in the evening, and that he and defendant stood looking at each other for a couple of minutes while they were facing each other eight or ten feet apart. He also testified that he based his identification of the defendant as the man who robbed him entirely on the facial features he observed at the time of the robbery. He explained that he had had the experience once before

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of being present as a customer when a business was robbed and that this experience was the reason why he "spent so much time studying this man's features, to try to determine his nervous or mental condition." The trial court's finding that the witness's identification was independent of anything which occurred at the lineup being supported by competent evidence, the witness's in-court identification testimony was competent and admissible despite any primary illegality in the lineup procedures, and defendant's first assignment of error is overruled. *State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972).

[2] In summarizing the State's evidence in order to explain the application of the law thereto, the record indicates that at one point the judge said:

"Now, the State further offered evidence tending to show *and does show*, that when Sheriff Stalcup was notified it was around 4:30, and it took the Sheriff 10 to 15 minutes to get to the store." (Emphasis added.)

Defendant contends the italicized words amount to an expression of opinion on the evidence in violation of G.S. 1-180. If so, the judge's slip of the tongue was certainly not such as to warrant a new trial. The record shows that in other portions of the charge, and in particular in the portion of the charge in which the judge summarized the State's evidence dealing with the events occurring during the actual commission of the robbery, the judge was careful to state that the State had offered evidence tending to show, and which the State "*contends does show*," certain occurrences. (Emphasis added.) Moreover, at the conclusion of his summary of the State's evidence, the judge instructed the jury:

"Now, members of the jury, that is what some of the evidence for the State tends to show. What it does show, if anything, is a matter entirely for you to determine."

It is simply not possible that the jury's verdict could have been influenced by the judge's single slip of the tongue now complained of, and defendant's assignment of error addressed to this point is overruled.

We have also carefully examined defendant's contentions relating to the remaining assignments of error brought forward on this appeal, and find them without merit. We find defendant's trial free from any prejudicial error.

Hudson v. Insurance Co.

No error.

Chief Judge BROCK and Judge MARTIN concur.

ELWOOD HUDSON v. NORTH CAROLINA FARM BUREAU MUTUAL
INSURANCE COMPANY, INC.

No. 7410SC714

(Filed 6 November 1974)

**Insurance § 2; Contracts § 7; Master and Servant § 11— competition after
retirement — forfeiture of retirement benefits — validity of agreement**

Provision of an insurance agency manager's agreement whereby the employee forfeits a monthly retirement allowance provided solely by the employer if the employee is licensed to sell or sells any kind of insurance in North Carolina during the payment period set forth in the agreement is not against public policy and is valid.

APPEAL by plaintiff from *McKinnon, Judge*, 3 June 1974
Session of Superior Court held in WAKE County.

This is an action to have the Court declare invalid a section of an Agency Manager's Agreement whereby plaintiff forfeits a monthly retirement allowance from defendant, his former employer, if plaintiff is licensed to sell or sells any kind of insurance in North Carolina during the payment period set forth in the agreement.

The material facts are undisputed. Plaintiff was employed by defendant as agency manager for Wayne County Farm Bureau Insurance Services from approximately 1 January 1960 to 1 March 1973. On 24 April 1969, plaintiff and defendant entered an agreement, amended in 1972, called an Agency Manager's Agreement.

Plaintiff has now retired as agency manager and, under the agreement, he or his beneficiaries are entitled to receive 120 consecutive monthly payments of \$114.26. These payments are based on premiums written in his territory, Wayne County, in the last calendar year before his retirement.

Defendant's casualty and fire insurance business in Wayne County was substantially increased during plaintiff's tenure as manager and substantially all of it was sold to residents of that

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county. Plaintiff has made no monetary contribution to the retirement plan, it being funded solely by defendant.

It is the following section of the agreement that plaintiff seeks to have the Court declare void:

"In order to be eligible to receive any of the benefits provided herein, Agency Manager shall not be licensed to sell nor shall he sell any kind of insurance in North Carolina at any time during the payment period set forth above. If Agency Manager violates this provision, no further payment shall be made by the Company, and Agency Manager shall reimburse the Company for any payments made because of not being informed, after the date of violation by Agency Manager."

The Court concluded that the agreement is "a constitutional, valid, and binding contractual agreement" and that plaintiff is not entitled to the benefits if he violates the contested section.

Boyce, Mitchell, Burns & Smith by Robert E. Smith for plaintiff appellant.

Broughton, Broughton, McConnell & Boxley, P.A. by Robert B. Broughton and Gregory B. Crampton for defendant appellee.

VAUGHN, Judge.

Plaintiff, with some logic, attacks the agreement in question with the same arguments that are generally advanced to vitiate covenants not to compete contained in employment contracts. A covenant not to compete is a provision embodied in an employment contract whereby an employee promises not to engage in competitive employment with his employer after termination of employment. Such a covenant is valid and enforceable only if given for a valuable consideration and if the restrictions are reasonable as to terms, time and territory. *Greene Company v. Kelley*, 261 N.C. 166, 134 S.E. 2d 166; *Mastrom, Inc. v. Warren*, 18 N.C. App. 199, 196 S.E. 2d 528.

The Agreement here, however, is not one where the employee agrees to refrain from competitive employment. The retired employee may engage in competitive employment without interference from his employer. If he does so, however, he forfeits his right to participate in a retirement plan to which he has made no monetary contribution.

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A direct question as to the validity of the forfeiture clause under attack here does not appear to have been previously presented to the Courts of the Appellate Division of this State.

In the few cases from other jurisdictions where the question has been considered "[t]he strong weight of authority holds that forfeitures for engaging in subsequent competitive employment, included in pension retirement plans, are valid, even though unrestricted in time and geography." *Rochester Corporation v. Rochester*, 450 F. 2d 118, 122-123. The Courts conclude that the forfeiture provisions are designed to protect the employer against competition by former employees who might retire and obtain benefits while engaging in competitive employment, and that the employer, as part of a noncontributory plan, can provide for this contingency. Annot., 18 A.L.R. 3d 1246, 1251; *Van Pelt v. Berefco, Inc.*, 60 Ill. App. 2d 415, 208 N.E. 2d 858. The Courts additionally conclude that the forfeiture, unlike the restraint included in an employment contract, is not a prohibition on the employee's engaging in competitive work but is merely a denial of the right to participate in the retirement plan if he does so engage. "A restriction in the contract which does not *preclude* the employee from engaging in competitive activity, but simply provides for the loss of rights or privileges if he does so is not in restraint of trade [citations]." *Brown Stove Works, Inc. v. Kimsey*, 119 Ga. App. 453, 455, 167 S.E. 2d 693, 695.

Other courts have reasoned, as does plaintiff, that although the employee has not made a financial contribution to the retirement plan, the pension rights have been earned by him and should not be divested by restrictions on future employment which would not be reasonable under the standards usually applicable to covenants not to compete. See *Food Fair Stores, Inc. v. Greeley*, 264 Md. 105, 285 A. 2d 632; *Mackie v. State Farm Mutual Automobile Ins. Co.*, 13 Mich. App. 556, 164 N.W. 2d 777. See also Note, Forfeiture of Pension Benefits for Violation of Covenants Not to Compete, 61 Nw. U. L. Rev., 290 at 303 (1966-67). Forfeiture provisions have also been invalidated in states with statutes which, in broad terms, invalidate contracts which by penalty or otherwise restrain employment. *Muggill v. Reuben H. Donnelley Corporation*, 62 Cal. 2d 239, 398 P. 2d 147. Note, 50 Cornell L. Quarterly, 673, 675 (1964-65).

We concur in the distinctions the majority of the Courts have made between contracts that preclude the employee from

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engaging in competitive activity and those that do not proscribe competitive employment but provide that retirement benefits provided solely by the employer under the terms of the agreement will be payable only in the event the employee elects to refrain from competitive employment. We hold that the latter, though unrestricted in time or territory, are not subject to the same consideration of public policy as the first.

The judgment declaring the forfeiture clause in the contract under consideration to be valid and enforceable is affirmed.

Affirmed.

Judges CAMPBELL and PARKER concur.

IDA MAE QUICK, ADMINISTRATRIX OF THE ESTATE OF DONALD GARY
QUICK v. UNITED BENEFIT LIFE INSURANCE COMPANY, AND
JILL QUICK

No. 7412DC700

(Filed 6 November 1974)

Insurance § 35— involuntary manslaughter of husband — right to life insurance proceeds

A wife who was convicted of involuntary manslaughter of her husband was not convicted of the "wilful and unlawful killing of another" within the meaning of G.S. 31A-3(3)a and thus was not a "slayer" who is barred by G.S. Chapter 31 from receiving the proceeds of a policy of insurance on the life of the husband; nor was the wife barred under the common law from receiving the proceeds of the policy since G.S. Chapter 31A has supplanted the common law rule which would have required her forfeiture of the proceeds.

Judge CAMPBELL dissenting.

APPEAL by defendant Jill Quick from *Herring, District Court Judge*, 17 June 1974 Session of District Court held in CUMBERLAND County.

This is an action for judgment declaring the ownership of proceeds of an insurance policy on the life of Donald Quick. The funds are being held by the Clerk of Superior Court.

Jill Quick, widow of Donald Quick, is the beneficiary named in the policy. She was indicted for the murder of Donald Quick

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and convicted of involuntary manslaughter as a result of the killing.

The judge concluded that Jill Quick was barred from taking the proceeds from the policy by reason of Chapter 31A of the General Statutes and the public policy of the State.

Lacy S. Hair for plaintiff appellee.

Deborah G. Mailman for defendant appellant.

VAUGHN, Judge.

If defendant Quick is a "slayer" within the meaning of Chapter 31A of the General Statutes entitled "Acts Barring Property Rights," she is barred by that Chapter from recovery of the insurance proceeds. The term "slayer" means a person who "shall have been convicted . . . of the wilful and unlawful killing of another" G.S. 31A-3 (3) a.

The question is whether a conviction of involuntary manslaughter is a conviction of the "wilful and unlawful killing of another." Presumably one cannot be "convicted" of a slaying other than one that is unlawful, so only the word "wilful" has significance. By omitting the word "wilful" the Legislature would have provided that a conviction of any degree of homicide would make one a "slayer" for purposes of the forfeiture provisions of the act. By inserting the word the Legislature limited forfeiture to those convicted of a higher degree of homicide where the killing must be found to be wilful. "Involuntary manslaughter has been defined to be, 'Where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part not amounting to a felony, or from a lawful act negligently done.'" *State v. Hovis*, 233 N.C. 359, 365, 64 S.E. 2d 564, 568. It is an unlawful killing without malice, without premeditation and deliberation, "and without intention to kill or inflict serious bodily injury." *State v. Wrenn*, 279 N.C. 676, 682, 185 S.E. 2d 129, 132. Thus to convict of involuntary manslaughter the State is not required to prove a wilful killing. Defendant Quick's conviction, therefore, does not make her a "slayer" with the definition. G.S. 31A-3 (3) a.

It is sound public policy that no person be allowed to profit by his own wrong. *Parker v. Potter*, 200 N.C. 348, 157 S.E. 68. For example, a beneficiary who caused the death of an insured under circumstances amounting to a felony was not allowed to

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recover under the policy. *Anderson v. Parker*, 152 N.C. 1, 67 S.E. 53. "But the General Assembly is the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter." *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E. 2d 231, 234. Having concluded that Jill Quick does not forfeit the benefits of the policy as a "slayer" under General Statute Chapter 31A, the remaining question for us is whether that chapter positively supplants the common law as it relates to her act. G.S. 31A-15 expressly provides that

"As to all acts specifically provided for in this chapter, the rules, remedies, and procedures herein specified shall be exclusive, and as to all acts not specifically provided for in this chapter, all rules, remedies, and procedures, if any, which now exist or hereafter may exist either by virtue of statute, or by virtue of the inherent powers of any court of competent jurisdiction, or otherwise, shall be applicable."

The verdict of guilty of involuntary manslaughter amounts to an acquittal of murder and voluntary manslaughter. In *McMichael v. Proctor*, *supra*, the widow admitted firing the shot that killed her husband but pled that in a criminal trial the jury had found her not guilty of any felonious slaying. By statute a widow then forfeited her dower if "convicted of the felonious slaying of her husband." The Court held that the language of the statute providing for forfeiture was positive, direct and unequivocal. The Court expressly declined to add another cause for forfeiture, and held that by including specific reasons for forfeiture the General Assembly had excluded all others. When it included a conviction of felonious slaying as a cause for forfeiture, the General Assembly excluded a slaying which resulted in an acquittal. But see *Tew v. Durham Life Ins. Co.*, 1 N.C. App. 94, 160 S.E. 2d 117. So it seems to us that by specifically including a conviction for wilful and unlawful killing as a cause for forfeiture, the General Assembly excluded a slaying which resulted in an acquittal of a "wilful and unlawful" killing and, with statutory exceptions not relevant here, all killings which do not result in a conviction of "wilful and unlawful" killings. Other courts applying similar statutes have so held. Annot., 27 A.L.R. 3d 794, 816. But see 40 N.C. L. Rev. 175 at page 221.

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Although Jill Quick has been convicted of taking the life of decedent, she was acquitted of the "wilful and unlawful killing" of decedent. It is our view that the General Assembly has elected to legislate in the subject matter of this controversy and that the policy so established supplants the common law rule which would not have allowed her to recover.

The judgment is reversed and the case is remanded for entry of judgment consistent with this opinion.

Reversed and remanded.

Judge PARKER concurs.

Judge CAMPBELL dissents.

Judge CAMPBELL dissenting:

I think G.S. 31A-15 is controlling and this was an unlawful killing and bars any recovery by the slayer. I therefore dissent.

STATE OF NORTH CAROLINA v. JACK BEST, ALIAS WILLIE FENNELL

No. 7418SC758

(Filed 6 November 1974)

1. Searches and Seizures § 3— issuance of search warrant — validity

A warrant to search defendant, his apartment, and his vehicle was properly issued where the issuing magistrate testified that he read and considered the affidavit submitted by a police officer, questioned the officer concerning the reliability of his informant and his reasons for believing that the defendant had heroin upon his person and in his residence and car, and reached his own independent judgment that there was probable cause for the issuance of a search warrant.

2. Searches and Seizures § 4— search of residence — authorization of warrant

A warrant which commanded the search of "Richard Sharpe (an alias used by defendant), 916 E. Cone Blvd. apt. F, 66 Dodge N.J. VLJ-816 for the property in question" specifically authorized a search of defendant's residence.

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ON *certiorari* to review trial before *Kivett, Judge*, 8 October 1973 Session of Superior Court held in GUILFORD County.

Heard in Court of Appeals 18 September 1974.

Defendant was tried upon an indictment charging possession of heroin, a controlled substance under Schedule I of the North Carolina Controlled Substances Act.

Pursuant to a search warrant defendant and his apartment at 916 East Cone Boulevard, Greensboro, were searched by Detective Daughtry of the Greensboro Police Department. The search of the apartment disclosed three measuring spoons with residue of heroin, a glassine bag containing heroin, several smaller glassine bags, and a sifter. Defendant admitted ownership of the heroin.

Prior to trial defendant moved to suppress the evidence obtained upon the search of his apartment on the ground that the search warrant was invalid. The warrant authorized the officers "to search Richard Sharpe [an alias used by defendant], 916 E. Cone Blvd. apt. F, 66 Dodge N.J. VLJ-816 for the property in question." It was based upon an affidavit of Officer Daughtry which set out in part that he had probable cause to believe that defendant and others had "on their persons and residence & vehicles. certain property, to wit: heroin, a controlled substance" and described the residence as apartment F, 916 E. Cone Boulevard, Greensboro, North Carolina and the vehicle as a 1966 Dodge four-door with New Jersey license VLJ-816.

Upon a voir dire hearing Magistrate Baker testified that he read the affidavit made by Officer Daughtry and examined the officer under oath concerning the reliability of his informant and other information reported in the affidavit. After such examination Magistrate Baker testified that he found probable cause to issue the search warrant for a search of defendant, his residence at apartment F, 916 East Cone Boulevard, and the 1966 Dodge automobile.

The motion to suppress was denied, and the heroin and other property admitted into evidence.

Defendant offered no evidence.

The jury returned a verdict of guilty and from judgment imposed thereon defendant entered notice of appeal. The tran-

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script of the trial was delayed and appeal was not perfected in time. This Court granted certiorari.

Attorney General James H. Carson, Jr., by Associate Attorney John R. Morgan, for the State.

Booth, Fish, Simpson and Harrison, by A. Wayne Harrison, for defendant appellant.

BALEY, Judge.

Defendant's sole assignment of error is to the denial of his motion to suppress evidence obtained by a search of his premises pursuant to a search warrant. He makes two specific objections: first, the procedure used by the magistrate in the issuance of the warrant did not permit an independent determination of probable cause, and, second, the warrant itself did not specifically authorize the search of defendant's residence. The trial court found from the testimony of the magistrate that the warrant was properly issued and that it authorized the search of defendant and his residence. We agree.

[1] Ordinarily a search warrant will be presumed regular if irregularity does not appear on the face of the record. *State v. Spillars*, 280 N.C. 341, 185 S.E. 2d 881. Here, however, the trial court chose to conduct a voir dire hearing, and the State presented plenary evidence to show the proper issuance of the warrant and the validity of the search. Magistrate Baker testified that he read and considered the affidavit submitted by Officer Daughtry and questioned the officer concerning the reliability of his informant and his reasons for believing that the defendant had heroin upon his person and in his residence and car. After such inquiry the magistrate reached his own independent determination that there was probable cause for the issuance of a search warrant. We find this procedure to be entirely in accord with the performance of his proper judicial function.

[2] The warrant which was issued commanded the search of "Richard Sharpe [an alias used by defendant], 916 E. Cone Blvd. apt. F, 66 Dodge N.J. V LJ-816 for the property in question." Magistrate Baker, in response to an inquiry from the court, stated that the warrant he issued authorized the search of each of the three: the defendant, his residence, and his automobile. It named the defendant, located and described the residence, and identified the automobile by make, model and license

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registration. There was ample evidence to support the ruling of the trial court.

No error.

Judges BRITT and HEDRICK concur.

PORT CITY ELECTRIC COMPANY v. HOUSING, INCORPORATED

No. 7421SC485

(Filed 6 November 1974)

Contracts § 19—novation—no issue of fact—summary judgment

In an action to recover the balance allegedly due under a contract, the evidence on motion for summary judgment was insufficient to establish an issue of fact as to whether a third party had assumed defendant's responsibilities under the contract and plaintiff had acquiesced in this change of parties, and the trial court properly entered summary judgment for plaintiff establishing defendant's liability under the contract and ordering trial on the sole issue of the balance due under the contract.

APPEAL by defendant from *McConnell, Judge*, 14 January 1974 Session of Superior Court held in FORSYTH County. Argued in the Court of Appeals 27 August 1974.

Plaintiff and defendant entered into a contract on or about 11 May 1970, whereby plaintiff was to furnish and install electrical wiring and fixtures in 212 houses and one community building in Northhills Subdivision, Winston-Salem, North Carolina. The contract sum was \$86,597.40, subject to additions and deductions by change order. Plaintiff instituted this action to recover the sum of \$13,850.76, the balance it alleges to be due under the contract.

Defendant's answer admits the due execution of the contract as alleged but denies liability for the balance due. Defendant alleges that on 31 December 1970, C. P. Robinson assumed the debts, obligations, and benefits of defendant in its contract with Port City Electric Company (Port City). Defendant further alleges that Port City ratified and acquiesced in the substitution of C. P. Robinson on the contract in the place of defendant.

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After interrogatories and cross-interrogatories plaintiff moved for summary judgment. Judge McConnell heard the motion on the pleadings, the interrogatories, and affidavit of the president of plaintiff, and an affidavit of the president of defendant. Judge McConnell concluded "that there is no genuine issue as to any material fact regarding the execution of the contract by the plaintiff and defendant and that the liability of the defendant to the plaintiff is indisputably established as a matter of law." He further concluded "that it is indisputably established that there occurred no novation of the contract between the plaintiff and defendant." Summary judgment was entered for plaintiff upon the issue of defendant's liability under the contract, and the case was set for trial on the sole issue of the balance due under the contract.

Defendant appealed from the entry of summary judgment establishing liability.

Collier, Harris, Homesley, Jones & Gaines, by Walter H. Jones, Jr., for the plaintiff.

Hoyle, Hoyle & Boone, by John T. Higgins, Jr., and John T. Weigel, Jr., for the defendant.

BROCK, Chief Judge.

Defendant's entire argument on this appeal is that the evidence on the summary judgment hearing shows a genuine issue as to a material fact, and therefore summary judgment for plaintiff establishing defendant's liability on the contract was error. Defendant argues that the evidence establishes a genuine issue as to a novation of the original contract. The argument is that C. P. Robinson agreed to assume defendant's responsibilities under the original contract and that plaintiff acquiesced in this change of parties.

By the use of interrogatories the parties have fully explored and developed the facts concerning the alleged novation. At the hearing on plaintiff's motion for summary judgment, the trial judge considered the pleadings, the contract, the interrogatories, the exhibits, and the affidavits before concluding that no genuine issue as to a material fact was raised with respect to the alleged novation. It will serve no purpose for us to articulate a summary of these lengthy documents. Suffice to say, in our view it is clearly established that defendant executed the original contract; that defendant and C. P. Robinson signed a written

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document concerning responsibilities of C. P. Robinson for performance of defendant's obligations under the original contract; that defendant never notified plaintiff of an attempted substitution of Robinson in the place of defendant under the original contract; and that plaintiff in no way exhibited acquiescence in such a substitution, if such was in fact intended by defendant and Robinson. It is defendant's argument that plaintiff thereafter dealt with Robinson only. However, this argument is defeated by the terms of the original contract, where plaintiff and defendant agreed as follows in Article 4: "The work to be performed under this contract shall be commenced as per schedule supplied by C. P. Robinson Construction Co. and completed as per schedule supplied by C. P. Robinson Construction Co."

The only indication in this record that plaintiff was aware of an agreement between defendant and Robinson is a conclusory allegation in defendant's answer, a conclusory statement in defendant's affidavit, the argument in defendant's brief, and oral argument by defendant. These conclusory statements, unsupported by factual allegations and evidence, are not sufficient to raise a genuine issue as to the material fact of a novation.

A novation is generally described as the substitution of a new contract for an existing valid contract by agreement of the parties, and ordinarily the parties must have intended that the new agreement should be in substitution for and extinguishment of the old. 2 Strong, N. C. Index 2d, Contracts, § 19. Although such an agreement can possibly be consummated by ratification, in our opinion evidence of ratification is wholly lacking in this record; therefore no genuine issue as to this fact has been raised.

In our opinion summary judgment for plaintiff establishing defendant's liability under the contract and the order for trial on the sole issue of the balance due under the contract were correct. The same are affirmed and the cause remanded to the Superior Court for trial in accordance with the terms of the judgment appealed from.

Affirmed and remanded.

Judges MORRIS and MARTIN concur.

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FORSYTH COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER v. JIMMY ALFRED ROBERTS AND VERNA MARIE ROBERTS (IN THE MATTER OF: VICKIE MARIE ROBERTS, AGE 10; MICKEY ALFRED ROBERTS, AGE 7; NICKI A. ROBERTS, AGE 4; AND RICKI R. ROBERTS, AGE 1), RESPONDENTS

No. 7421DC507

(Filed 6 November 1974)

Infants § 9— custody — no showing of changed circumstances

Trial court did not err in denying the parents' motion for custody of their children where the parents did not show that circumstances had changed which would require modification of the original order that the children's legal and physical custody rest in the county department of social services.

APPEAL by Jimmy Alfred Roberts and Verna Marie Roberts from *Alexander (Abner)*, *District Court Judge*, 22 January 1974 Session of District Court held in FORSYTH County. Argued in the Court of Appeals 27 August 1974.

Upon petition filed by the petitioner, Forsyth County Department of Social Services, an immediate custody order was signed by District Court Judge Henderson on 8 May 1972 removing the above-named children from their parents' home and placing them in the temporary physical custody of petitioner. On 12 May 1972 an evidentiary hearing was conducted in the cause, at the conclusion of which Judge Henderson determined that the children were neglected children. The judge awarded legal and physical custody of the children to petitioner for the purpose of placing them in suitable foster homes.

On 17 January 1973 the respondents, Jimmy Alfred Roberts and Verna Marie Roberts, father and mother of the above-named children, filed a motion in the cause for a review of the custody order heretofore entered. A hearing on respondents' motion was conducted before District Court Judge Sherk on 14 February 1973. Judge Sherk entered an order dated 27 February 1973 continuing the legal and physical custody of the children in petitioner.

On 21 September 1973 respondents filed a motion for return of custody of the children to their parents. On 23 November 1973 District Court Judge Alexander ordered an investigation by the counselor of the Family Counseling Service. An investigation was conducted, and the counselor's report was filed prior to the hearing from which this appeal was taken.

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The cause was heard by Judge Alexander on the 22nd and 23rd of January, 1974, at which time evidence was offered by respondents and petitioner. At the conclusion of the hearing, Judge Alexander denied the parents' (respondents') motion for custody and ordered that the children remain wards of the court and that the legal and physical custody of the children remain in the Forsyth County Department of Social Services. Respondents appealed.

Chester C. Davis, for petitioner, Forsyth County Department of Social Services.

The Legal Aid Society of Forsyth County, by Bertram Ervin Brown II, for respondents, Jimmy Alfred Roberts and Verna Marie Roberts.

BROCK, Chief Judge.

The motion filed in the trial court by respondents seeks a modification or change of three prior orders awarding custody of respondents' minor children to the petitioner, Forsyth County Department of Social Services. Such a motion should be based upon change of conditions, and the prior orders should be modified only upon appropriate showing and finding of material change of conditions which, in the best interest of the children, require a modification. 4 Strong, N. C. Index 2d, Infants, § 9.

Without recounting respondents' evidence, or lack thereof, we are of the opinion that the trial court was correct in concluding that little or no evidence was introduced from which it could be found that respondents would care for the physical, emotional, and educational needs of their children any better than in May of 1972 (the date of the original hearing in this cause).

Respondents argue at great length concerning their exceptions to the admission of evidence, particularly the report of the counselor of the Family Counseling Service. Assuming, without deciding, that respondents' contentions that the admission of this evidence was irrelevant to the inquiry, nevertheless, we are of the opinion that it was not prejudicial. Had the evidence to which respondents take exception been ruled out, the results would have been the same. The failure of respondents to prevail on their motion was a result of their failure to offer evidence from which a material change of circumstances could be found.

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We find no prejudicial error in the hearing and no abuse of discretion by the trial judge in the entry of the order from which this appeal was taken.

Affirmed.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. REMPSON DUFFEY

No. 7429SC645

(Filed 6 November 1974)

Criminal Law § 143— revocation of suspended sentence — possession of alcoholic beverages

Evidence that alcoholic beverages were found on defendant's premises on two occasions, one of which was uncontested, was sufficient to support a finding that defendant wilfully and without lawful excuse violated a condition of his suspended sentence that he not possess any liquor or beer.

APPEAL by defendant from *Martin (Robert M.)*, *Special Judge*, 18 March 1974 Session of RUTHERFORD Superior Court. Heard in the Court of Appeals 14 October 1974.

Defendant was charged in a warrant dated 26 December 1971 with unlawfully and wilfully possessing spirituous liquors for the purpose of sale. He was tried and found guilty in district court and was sentenced in a judgment dated 21 January 1972 to six months in Rutherford County jail. This sentence was suspended for three years on the condition, *inter alia*, that he "not possess, transport or sell any liquor or beer."

Thereafter, on 26 February 1972, pursuant to a valid search of the defendant's house, a small quantity of beer and liquor was found. Notice was served on the defendant under G.S. 15-200.1 to the effect that revocation of his suspended sentence would be sought at the 3 March 1972 session of district court. The defendant did not appear for hearing at the time specified and nothing was done.

On 27 October 1973, a search warrant was issued on probable cause to believe that the defendant again had in his possession beer and liquor for the purpose of sale. A large quantity

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of beer and wine was found whereupon a *capias* instanter was issued for the defendant's arrest. Notice was served and a hearing was held after which judgment was entered on 14 November 1973 revoking the suspension and placing the sentence into effect. The district court judge found that "the defendant willfully allowed into his possession beer as specified in the proceedings"

The defendant appealed to superior court. After a hearing on 18 March 1974, the superior court ordered the suspended sentence into effect and found that the defendant had possessed alcoholic beverages in violation of the conditions of his suspended sentence and that said violation was without lawful excuse.

The evidence for the State showed that Sheriff Blane Yelton, pursuant to a search warrant, had found a large quantity of alcoholic beverages in the basement of the defendant's house on the morning of 27 October 1973. The defendant claimed that it was not his and that his nephew had had a party there that night. The sheriff had watched the house that night and had observed a tremendous amount of traffic going to and from the residence carrying paper bags. The sheriff also observed an elaborate bar in the basement of defendant's house.

The defendant and his nephew testified that there had been a party in the basement for the nephew's friends, that the defendant had never come downstairs during the party and that the beer, etc. was not the defendant's. All the nephew's friends came into the house through a basement door.

From the order of the superior court revoking the suspension and placing the suspended sentence into effect, the defendant appealed.

Attorney General James H. Carson, Jr., by Associate Attorney James Wallace, Jr., for the State.

Hamrick and Hamrick by J. Nat Hamrick for the defendant appellant.

CAMPBELL, Judge.

The defendant contends that the beer and wine found in his basement was not his but his nephew's, and that it was, therefore, not in his "possession" as contemplated by the probation condition. The defendant alternatively contends that if

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the alcoholic beverages were in his "possession," he had a lawful excuse for it being there.

"Probation or suspension of sentence comes as an act of grace to one convicted of . . . a crime. . . .

* * * *

All that is required in a hearing of this character is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended." *State v. Duncan*, 270 N.C. 241, 245, 154 S.E. 2d 53, 57 (1967).

There was evidence in the record that alcoholic beverages had been found in the defendant's residence on more than just the occasion of the nephew's alleged party. On another occasion, alcoholic beverages were found whereupon the defendant was served with notice to appear in court. He failed to appear. Furthermore, he did not attempt in the present proceedings to answer the prior charge.

The evidence that alcoholic beverages were found on the defendant's premises on two occasions, one of which was uncontested, was sufficient to support a finding that the defendant had wilfully violated a condition of his suspended sentence and that such violation was without lawful excuse. The revocation of the defendant's suspended sentence was without error.

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. CECIL BOYD GRACE

No. 7414SC597

(Filed 6 November 1974)

1. Criminal Law § 34; Robbery § 3— defendant's participation in other crimes — admissibility

The trial court in a prosecution for armed robbery did not err in allowing a witness to testify that he and defendant had robbed three other places before the robbery for which defendant was on trial, since such testimony was relevant to show the relationship

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between defendant and the witness and their continuing association until dates close to the date of the crime charged.

2. Robbery § 3— defendant in possession of pistol — evidence properly admitted

The trial court did not err in permitting a witness to testify that he saw defendant approximately one month prior to the date of the crime charged at the King Cole Supermarket with a pistol in his hands, since that evidence tended to establish that defendant owned a pistol, a fact which was relevant in this case.

APPEAL by defendant from *Brewer, Judge*, 7 January 1974 Criminal Session of Superior Court held in DURHAM County.

Criminal prosecution for armed robbery. The State's evidence showed that on the night of 17 August 1973 two young men robbed the Farm Fresh Dairy Store in Durham, taking \$400.00 from the cash register and shooting the operator with a .32 caliber automatic pistol in the process. One of the men, Darnell Malloy, testified for the State that he and defendant committed the robbery, that defendant had the pistol and shot the store keeper, and that they divided the \$400.00 equally between them.

Defendant testified that he had known Malloy in high school and had run around with him until the first of July 1973, when they had a falling out, and that he had had nothing to do with Malloy after that date. He testified that at the time of the robbery he was at his girl friend's house, and defendant's girl friend and sister testified in support of his alibi.

The jury found defendant guilty, and from judgment imposing a prison sentence, defendant appealed.

Attorney General James H. Carson, Jr. by Assistant Attorney General Thomas B. Wood for the State.

Rudolph L. Edwards for defendant appellant.

PARKER, Judge.

[1] Over defendant's objections the accomplice, Malloy, testified that during the period of about four weeks he and defendant had robbed three other places before they robbed the Farm Fresh Dairy Store and that defendant carried the pistol with him each time. This testimony was corroborated by a statement which Malloy had given the police shortly after his arrest. Defendant contends that it was error to admit this evidence

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of defendant's participation in criminal activity other than that for which he was being tried.

"Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime." 1 Stansbury's N. C. Evidence (Brandis Revision) § 91, p. 289. Here, the testimony was relevant to show the relationship between defendant and the witness and their continuing association until dates close to the date of the crime charged. Had the witness testified that he and defendant were constant companions in innocent pursuits during that period of time, such testimony would have been relevant and competent to show their relationship. The testimony which the witness gave was no less relevant for the same purpose and was not rendered incompetent merely because it also showed defendant guilty of other crimes. There was no error in overruling defendant's objections to this testimony.

The testimony of the accomplice as to his association with defendant having been properly admitted, there was also no error in admitting, solely for purposes of corroboration, the testimony of the police officer as to the accomplice's prior consistent statement.

[2] On cross-examination the defendant testified that he did not own a .32 caliber pistol. In rebuttal the State presented a witness who was permitted to testify over defendant's objections that on 20 July 1973 he saw defendant at the King Cole Supermarket with a pistol in his hands. The witness was not asked and did not testify what, if anything, defendant had done on that occasion and it is not clear from the record whether the King Cole Supermarket was one of the three places which Malloy testified he and defendant had robbed before committing the robbery for which defendant was tried. However, that may be and even if the testimony of the State's rebuttal witness be considered as tending to show defendant guilty of an independent crime other than that for which he was being tried, the testimony was nevertheless properly admitted as tending to show that defendant owned a pistol, a fact which was relevant in this case.

In defendant's trial and in the judgment appealed from we find

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No error.

Chief Judge BROCK and Judge MARTIN concur.

IN THE MATTER OF: LAWRENCE GOODING, AGE 15

No. 748DC799

(Filed 6 November 1974)

1. Infants § 10— delinquency proceeding — proof beyond reasonable doubt required

Proof beyond a reasonable doubt is constitutionally required during the adjudicatory stage of a juvenile delinquency proceeding.

2. Infants § 10— delinquency proceeding — larceny from supermarket — sufficiency of evidence

Evidence was insufficient to support the trial court's findings that the child wilfully concealed merchandise on or about his person and that he was delinquent as defined in G.S. 7A-278(2) where such evidence tended to show that the child took a paper bag from the meat counter of a supermarket, placed an apple pie and a quart of beer therein, and proceeded up one of the aisles of the store toward the check-out counter with the bag in his hand.

APPEAL by respondent child from *Pate, District Judge*, 3 May 1974 Session of District Court held in LENOIR County.

This juvenile delinquency proceeding was commenced against respondent, a 15-year-old boy, by petition signed by Clara H. Sparrow in which it is alleged that respondent was "a delinquent child as defined by G.S. 7A-278(2) in that at and in the county named above and on or about the 16th day of February 1974, the child did unlawfully and wilfully and without authority conceal an apple pie and a quart of Schlitz beer of Raynor's Super Market, while still upon the premises of the store and not having therefore purchased such merchandise," in violation of G.S. 14-72.1.

Evidence presented at the hearing, as summarized by the district judge, was as follows:

Clara Sparrow testified:

"That she was a clerk in Raynor's Super Market on the 18th day of February, 1974. That on said date she saw the defendant, Lawrence Gooding, enter Raynor's Super

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Market and further saw said defendant go to the meat counter where he picked up a brown paper bag from a supply maintained there. Said child then proceeded to pick up an Apple Pie and a Quart of Schlitz Beer and placed them in the paper bag. The child then proceeded up one of the aisles in the grocery store toward the check-out counter with the paper bag in his hand. The witness had called the police and at this point the police arrived in the store. The child dropped the paper bag when the police arrived. The witness stated that the bag had been held by the child in his hand and not concealed."

Tessie Wiggins testified:

"That she was a clerk in Raynor's Super Market on the 18th day of February, 1974. The balance of TESSIE WIGGINS' testimony was substantially the same as the testimony of CLARA SPARROW."

The respondent child testified:

"That he was in Raynor's Super Market on February 18, 1974. That he did place the Apple Pie and Quart of Schlitz Beer in a paper bag on said occasion. That he had placed said items in the paper bag because they were cold. That when the police came in he was heading toward the check-out counter to pay for said goods and had \$5.00 on his person at the time."

On the foregoing evidence the court found that the child did willfully conceal merchandise on or about his person as alleged in the petition and that he was delinquent as defined in G.S. 7A-278(2). On these findings the court ordered that the child "be returned to the custody of the N. C. Board of Youth Development for an indefinite term to be assigned to whatever facility operated by said Board is found to be in the best interest of this child." From this order, the child appeals.

Attorney General Carson by Assistant Attorney General Reed for the State.

Everette L. Wooten, Jr. for respondent appellant.

PARKER, Judge.

[1, 2] Since the decision of the United States Supreme Court in *In re Winship*, 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068

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(1970), proof beyond a reasonable doubt is constitutionally required during the adjudicatory stage of a juvenile delinquency proceeding. Although the record in the present case does not disclose what standard of proof was applied by the district judge in making the factual determination on which his order is based, in our opinion the evidence was not sufficient, had this been a criminal prosecution against an adult, to justify submission of the case to a jury. In such case nonsuit would have been required. It is no less required in this case in which a juvenile is involved. *In re Alexander*, 8 N.C. App. 517, 174 S.E. 2d 664 (1970).

Judgment reversed, and the proceeding is dismissed.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. SAM JOHN PASSARELLA

No. 745SC756

(Filed 6 November 1974)

Searches and Seizures § 4— search without warrant—second search at police station under warrant—legality

Where officers, on the basis of information received from a confidential informant, stopped the car in which defendant was riding and searched defendant and other occupants of the car in the rest room of a service station but found no controlled substances, and officers then received additional information from the informant that he had observed a controlled substance on defendant's person a short time before the automobile was stopped, a second search of defendant at the sheriff's department after the officers obtained a search warrant for his person, which revealed controlled substances on his person, did not violate defendant's constitutional rights against unreasonable searches and seizures.

APPEAL by defendant from *Tillery, Judge*, 1 April 1974 Session of Superior Court held in NEW HANOVER County. Heard in the Court of Appeals 15 October 1974.

Defendant was charged with possession with intent to distribute a controlled substance, cocaine, in violation of G.S. 90-95(a) (1). Upon the jury's verdict of guilty, the trial judge imposed a sentence of not less than three years nor more than five years.

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The State presented evidence which tended to show that law enforcement officers were advised by a previously reliable confidential informant that defendant had controlled substances in his possession; that on the basis of this information officers stopped an automobile in which the defendant was riding in Wilmington, North Carolina; that officers immediately conducted a strip search of defendant and all other occupants of the automobile in the rest room of a nearby service station but found no controlled substances; that following the search, officers received additional new information from the same confidential informant that he had observed a controlled substance on defendant's person a short time before the automobile was stopped; that on the basis of this new information officers took the defendant to the New Hanover Sheriff's Department where they obtained a search warrant for his person; and that officers conducted a second and more thorough search of defendant pursuant to the search warrant and found controlled substances on his person in violation of the law.

The defendant did not testify in this case nor offer any evidence. By way of cross-examination of the State's witnesses, however, defendant brought out evidence tending to show that of the three men who were in the automobile he was the only one served with a search warrant and that he was the only one who was carried to the jail and caused to be stripped of his clothing and his body searched; that the rest room in which he initially was searched was not a place of his own choosing; and, finally, that after he was taken to the Sheriff's Department, a considerable time period elapsed before the materials which were offered into evidence were discovered.

Attorney General Carson, by Deputy Attorney General White and Assistant Attorney General Guice, for the State.

Burney, Burney, Sperry & Barefoot, by George H. Sperry, for defendant appellant.

MORRIS, Judge.

Defendant's only assignment of error relates to the denial of his motion to suppress the evidence that was introduced at trial. He does not contest the validity of the original search, but argues that the subsequent search of his person violated his constitutional rights against unreasonable searches and seizures. Defendant maintains that in these circumstances officers had

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the right *either* to search him immediately *or* take him to the courthouse, get a search warrant and then conduct a search. He argues that officers cannot be allowed to do both. We find no merit in this contention.

Defendant's broad assertion is unsupported by applicable law, nor do we feel such a rule should be the law. In our opinion, to require the officers to make such an election under these circumstances would place too heavy a burden on law enforcement officers in the detection and investigation of criminal conduct. We conclude it would be neither reasonable nor practical to bind law enforcement officers to an election.

Additionally, we note that on voir dire the trial judge in this case made extensive findings of fact and based on these findings concluded as a matter of law that the search of the defendant was valid. "These findings of fact by the trial judge are conclusive when, as here, they are supported by competent evidence." *State v. Bass*, 280 N.C. 435, 445, 186 S.E. 2d 384 (1972), and cases cited therein.

The trial judge's findings in this case support the conclusion that the officers had reasonable ground to believe that a felony had been committed by the defendant and that he might escape if he were not carried to the Sheriff's Department and a more extensive search conducted, the officer having testified and the court having found as a fact that because of the restricted area of the room and the size of the occupants, the body search conducted in the rest room was not a thorough search. The new or additional information received from the informer was additional reason for a more thorough search.

No error.

Judges HEDRICK and BAILEY concur.

STATE OF NORTH CAROLINA v. WILLIE STEELE, JR.

No. 7421SC729

(Filed 6 November 1974)

Criminal Law § 99—questioning of witnesses by judge—sustaining own objections by judge

Defendant is entitled to a new trial where the trial court intervened with questions and comments well over 100 times, belittled and

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humiliated defense counsel, and assumed the role of solicitor in sustaining his own objections to testimony offered by defendant.

APPEAL by defendant from *McConnell, Judge*, 1 April 1974 Session of Superior Court held in FORSYTH County. Heard in the Court of Appeals 24 September 1974.

Defendant was charged in a bill of indictment with breaking and entering, and larceny and receiving. Following presentation of the evidence the jury returned verdicts of guilty of breaking and entering and larceny and the trial judge imposed a sentence of not less than five years nor more than ten years for the crime of breaking and entering and a sentence of three years for the crime of larceny, with sentence suspended for five years upon defendant's compliance with certain named conditions. Defendant appealed.

Additional facts necessary for decision are set forth in the opinion.

Attorney General Carson, by Assistant Attorney General Ricks, for the State.

Roberts, Frye and Booth, by Leslie G. Frye, for defendant appellant.

MORRIS, Judge.

In his first assignment of error the defendant contends that the trial court committed error by repeatedly intervening with comments and questions with such regularity and in such a manner as to amount to an expression of opinion by the court and by assuming the role of prosecutor in sustaining his own objections, all in violation of G.S. 1-180. Altogether the trial judge intervened with questions or comments well over 100 times. After examining the record closely, we feel compelled to sustain this assignment of error.

"G.S. 1-180 imposes on the trial judge the duty of absolute impartiality. *Nowell v. Neal*, 249 N.C. 516, 107 S.E. 2d 107 (1959). It forbids the judge to intimate his opinion in any form whatever, 'it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury.' *State v. Owenby*, 226 N.C. 521, 39 S.E. 2d 378 (1946). It has been construed to include any opinion or intimation of the judge *at any time during the trial* which

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is calculated to prejudice either of the parties in the eyes of the jury. *State v. Douglas*, 268 N.C. 267, 150 S.E. 2d 412 (1966); *Everette v. Lumber Company*, 250 N.C. 688, 110 S.E. 2d 288 (1959). 'Both the courts and those engaged in the active trial practice recognize the strong influence a trial judge may wield over the jury. "The trial judge occupies an exalted station. Jurors entertain great respect for his opinion, and are easily influenced by any suggestion coming from him. As a consequence, he must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. G.S. 1-180."' *State v. Belk*, 268 N.C. 320, 150 S.E. 2d 481 (1966)." (Emphasis supplied.) *State v. Frazier*, 278 N.C. 458, 180 S.E. 2d 128 (1971).

Applying well-settled principles to the facts now before the Court we note that "[i]t is not . . . improper for the court to ask questions for the purpose of obtaining a proper understanding and clarification of a witness' testimony *as long as the trial judge does not engage in frequent interruptions and prolonged questioning.* (Citation omitted.)" (Emphasis supplied.) *State v. Huffman*, 7 N.C. App. 92, 171 S.E. 2d 339 (1969). But "[i]f by their tenor, their frequency, or by the persistence of the trial judge they tend to convey to the jury in any manner at any stage of the trial the 'impression of judicial leaning,' they violate the purpose and intent of G.S. 1-180 and constitute prejudicial error." *State v. Frazier*, *supra*, and cases cited therein; *State v. Lowery*, 12 N.C. App. 538, 183 S.E. 2d 797 (1971); *State v. Wright*, 16 N.C.App. 562, 192 S.E. 2d 655 (1972), cert. denied 282 N.C. 584 (1973).

As we have already pointed out, here the trial judge intervened with questions and comments well over 100 times. In reviewing the record we find that many of the questions posed to witnesses by the trial judge went beyond an effort to obtain a proper understanding and clarification of their testimony. Furthermore, several of the judge's comments tended to belittle and humiliate defense counsel in the eyes of the jury. While any one of these questions or comments standing alone, even though erroneous, might not be regarded as prejudicial, when viewed in light of their cumulative effect upon the jury we conclude they seriously prejudiced defendant's case.

We also find merit in the defendant's contention that the trial judge assumed the role of the solicitor in sustaining his

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own objections to testimony offered by the defendant. Several times during the course of the trial, apparently in an effort to speed up the trial, the trial judge himself entered and sustained his own objections. Although these objections would have been proper objections for the solicitor to make, the cumulative effect of the court's repeatedly assuming the role of the solicitor constituted prejudicial error.

Additionally, although inadvertently done, the court in his instructions to the jury, used language which could have led the jury to believe that the court was convinced of defendant's guilt.

For the reasons above set out, there must be a new trial.

New trial.

Judges HEDRICK and BALEY concur.

JOHNNY LEE FINCH v. DAVID McARTHUR MERRITT AND CITY OF
DURHAM

No. 7414DC686

(Filed 6 November 1974)

**Automobiles § 79— intersection accident —striking police car with blue
lights flashing — contributory negligence**

The trial court did not err in concluding that plaintiff was contributorily negligent in failing to keep a proper lookout and failing to keep his vehicle under reasonable control when he struck a police car which entered an intersection through a red light with its blue lights flashing.

PLAINTIFF appeals from *Read, Judge*, 25 March 1974 Civil Session of DURHAM County, District Court Division.

This is a civil action tried without a jury before Judge Read wherein plaintiff seeks damages resulting from an automobile collision and defendants counterclaim for damages under the same facts. The trial court made the following pertinent findings of fact:

- “1. That at approximately 4:15 a.m. on the morning of Sunday, July 30, 1972, the defendant, David McArthur Merritt, acting within the scope of employment as a police

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officer employed by the defendant City of Durham, was proceeding west on Club Boulevard . . . on an emergency and official police business mission (attempting to prevent auto theft) with his flashing blue lights in operation and his siren sounding.

2. That at a distance of approximately 150 feet from the intersection of Club Boulevard with Buchanan Boulevard, the defendant discontinued the use of his siren but continued to utilize his flashing blue light.
3. That as the defendant approached the intersection of Club Boulevard with Buchanan Boulevard the traffic signal facing him was red. That when defendant was a distance of between 50 and 60 feet from the intersection the defendant first saw the plaintiff approaching the intersection. . . . That at this time the plaintiff's vehicle was traveling at approximately 20 miles per hour and was reducing its speed as it approached the intersection.
4. That as the plaintiff approached the intersection . . . he first saw the vehicle operated by the defendant when the defendant's vehicle was approximately 10 to 15 feet from the said intersection. That at this time the defendant was reducing the speed of his vehicle and was traveling at approximately 20 miles per hour. That at this time the plaintiff's vehicle was 3 to 4 car lengths from the intersection.
5. That the flashing lights on defendant's police car were continuously on at said intersection.
6. That the plaintiff's vehicle collided with the defendant's vehicle in the intersection after three-fourths of the defendant's car had passed in front of the plaintiff's car, striking the defendant's in its side at its right rear fender. That both cars were traveling at approximately 20 miles per hour when they entered the intersection and at the time of the collision.
7. The plaintiff saw the defendant moving and slowing down while both of them were approaching the intersection, but saw nothing else until the instant before the collision."

The trial judge concluded that defendant was negligent and that plaintiff was contributorily negligent in failing to maintain

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a proper lookout and failing to keep his vehicle under reasonable control. From a judgment declaring that plaintiff recover nothing, plaintiff appealed.

Pearson, Malone, Johnson, DeJarmon & Spaulding, by C. C. Malone, Jr., for plaintiff appellant.

Spears, Spears, Barnes, Baker & Boles, by J. Bruce Hoof, for defendant appellees.

MARTIN, Judge.

Plaintiff argues the trial court's conclusion that plaintiff was contributorily negligent is not supported by the findings of fact. We disagree. Plaintiff cites *Galloway v. Hartman*, 271 N.C. 372, 156 S.E. 2d 727 (1967) where the Court refers to *Curran v. Williams*, 248 N.C. 32, 102 S.E. 2d 455 (1958). In *Curran v. Williams*, *supra*, the Court states at page 36:

"In *Wright v. Pegram*, *supra*, Higgins, J., states the rule as established by prior decisions as follows: ' . . . a motorist facing a green light as he approaches and enters an intersection is under the continuing obligation to maintain a proper lookout, to keep his vehicle under reasonable control, and to operate it at such speed and in such manner as not to endanger or be likely to endanger others upon the highway. (Citation.) Nevertheless, *in the absence of anything which gives or should give him notice to the contrary*, a motorist has the right to assume and to act on the assumption that another motorist will observe the rules of the road and stop in obedience to a traffic signal.' (Citations.)" (Emphasis added.)

We hold that, in the case at bar, there were sufficient findings of fact upon which the trial court could conclude that plaintiff was contributorily negligent in that he failed to keep a proper lookout and failed to keep his vehicle under reasonable control.

Affirmed.

Chief Judge BROCK and Judge MORRIS concur.

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LINDA CARWELL, WIDOW v. FRANK WORLEY AND WIFE, EVELYN WORLEY

No. 7428DC737

(Filed 6 November 1974)

Cancellation and Rescission of Instruments § 8— action to set aside deed — sufficiency of allegations in amended complaint

In a proceeding to have a deed set aside the trial court properly granted defendants' motion for summary judgment where the court entered a final judgment against plaintiff, but gave her twenty days to file an amended complaint, and plaintiff did file an amended complaint, but allegations of the complaint were insufficient to show fraud, mistake or undue influence.

PLAINTIFF appeals from *Weaver, Judge*, 11 April 1974 Session of District Court held in BUNCOMBE County.

Plaintiff instituted this action on 10 March 1972, asking the court to impose a trust in favor of plaintiff on certain real estate. In her complaint, plaintiff alleged in pertinent part as follows:

On 1 April 1971, plaintiff and her late husband owned a parcel of land in Buncombe County. The feme defendant was a first cousin of plaintiff's husband and a confidential relationship existed between the two. On said date, plaintiff's husband was suffering from terminal cancer, resulting in impairment to his mental and emotional faculties. On that date, plaintiff and her husband executed a deed conveying their real estate to defendants; the conveyance was made upon the assurance by defendants that they would reconvey the property to plaintiff or her husband at any time they, or either of them, might request. Plaintiff's husband died three weeks later and defendants have refused plaintiff's request to reconvey the property to her. Plaintiff is a native of Europe and "did not realize the full nature and extent of her action"

Defendants filed answer denying material allegations of the complaint and alleging that the conveyance was supported by valuable considerations.

On 21 February 1973, defendants moved for summary judgment pursuant to G.S. 1A-1, Rule 56. Their motion was supported by their affidavit detailing the considerations which they contend they paid for the property. Plaintiff filed a counter affidavit in which she denied the considerations averred in

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defendants' affidavit and she set forth other allegations relating to the execution of the deed.

On 16 April 1973, following a hearing, the court entered judgment allowing defendants' motion for summary judgment. However, in its discretion, the court allowed plaintiff twenty days within which to file an amended complaint or other pleading, "... otherwise this action to be dismissed finally and with prejudice."

Thereafter, plaintiff filed an amended complaint to which defendants filed answer. Defendants then filed a second motion for summary judgment. On 11 April 1974, the court entered judgment allowing defendants' motion and dismissing plaintiff's action with prejudice. Plaintiff appealed.

Cecil C. Jackson, Jr., for plaintiff appellant.

Swain & Leake, by A. E. Leake, for defendant appellees.

BRITT, Judge.

Plaintiff's sole exception is to the signing of the judgment entered on 11 April 1974. The judgment entered on 16 April 1973 was a final judgment with respect to pleadings and materials that had been filed with the court at that time. Since plaintiff did not except to, or appeal from, the 16 April 1973 judgment, the effect of that judgment was to estop plaintiff from challenging its validity based on pleadings and facts that were then before the court. 2 McIntosh, North Carolina Practice and Procedure 2d, § 1731. In *McIntosh*, *supra*, § 1732, we find: "The estoppel will apply to all final judgments, however irregular or erroneous they may be, until they are set aside by some proper proceeding; but a void judgment will not operate as an estoppel. . . ."

After summary judgment was entered on 16 April 1973 in favor of defendants, with provision that plaintiff might file an amended complaint within twenty days, the only additional document filed or presented by plaintiff was the amended complaint. The only information of substance contained in the amended complaint that was not before the court when it considered defendants' first motion for summary judgment is as follows:

"That the Defendants came to the Plaintiff and her husband some few weeks prior to April 1, 1971 and advised

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Plaintiff and her above-named deceased husband that they owned various parcels of real property which the Defendants did not own and made various other statements as to their financial condition, which was false . . . ; and that relying upon the statements of the Defendants, the Plaintiff and her husband executed and conveyed the above described property to the Defendants. . . . ”

In *Loftin v. Kornegay*, 225 N.C. 490, 492, 35 S.E. 2d 607 (1945), the court said: “. . . A parol agreement in favor of a grantor, entered into at the time of or prior to the execution of a deed, and at variance with the written conveyance is unenforceable in the absence of fraud, mistake or undue influence. . . . (Citations).” See also *Gaylord v. Gaylord*, 150 N.C. 222, 63 S.E. 1028 (1909).

We do not think the quoted allegations from the amended complaint was sufficient to show fraud, mistake or undue influence, a showing that would be necessary to support a cause of action to set aside a warranty deed conveying real estate or to impose a trust thereon. We hold that the judgment entered on 11 April 1974 dismissing the action was proper.

Affirmed.

Judges CAMPBELL and VAUGHN concur.

JULIA YEARWOOD v. THOMAS RAY YEARWOOD

No. 7414DC769

(Filed 6 November 1974)

1. Divorce and Alimony § 18— alimony pendente lite — party entitled to relief demanded

Trial court did not err in granting plaintiff alimony *pendente lite* and counsel fees since findings by the court that defendant assaulted plaintiff and that defendant's treatment of plaintiff constituted a constructive abandonment were sufficient to support a conclusion that plaintiff was entitled to the relief demanded.

2. Divorce and Alimony § 16— alimony as house payment

The trial court did not exceed its authority in ordering that \$110 per month alimony be paid by defendant to the holder of the mortgage on the home owned by the parties by the entirety and that the equity accruing from the date of the order from the house payments be that of plaintiff alone.

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3. Divorce and Alimony § 18— alimony pendente lite — transfer of vehicle title

Trial court in an action for alimony *pendente lite* did not exceed its authority in ordering defendant to transfer title to a Volkswagen to plaintiff who would thereafter be responsible for making payments on the vehicle.

APPEAL by defendant from *Read, Judge*, 25 March 1974 Session of District Court held in DURHAM County.

In her complaint filed in this action, plaintiff asks for alimony without divorce, support for two minor children, possession of the home owned by the parties as tenants by the entirety, attorney fees, and such further relief as the court deems appropriate. Defendant filed answer and counterclaim in which he pleaded various defenses and asked for custody of the children, absolute divorce on ground of adultery, or a divorce from bed and board.

Following a hearing on plaintiff's motion for alimony *pendente lite*, child support, counsel fees and possession of the home, the court entered an order finding facts and providing the following:

(1) Awarding plaintiff possession of the home jointly owned by the parties.

(2) Ordering defendant to transfer title to a 1973 Volkswagen to plaintiff who thereafter would be responsible for "financing" said automobile.

(3) Ordering defendant to pay \$110 per month alimony, the payments to be made by defendant directly to the holder of the mortgage on the home owned by the parties, with provision that "... the equity accruing from this date from the house payments will be that of the plaintiff alone. . . ."

(4) Ordering defendant to pay \$50 per week child support.

(5) Ordering defendant to maintain the same health, medical and dental insurance on the two children that was in effect on the date of the hearing.

(6) Awarding plaintiff custody of the children, with reasonable visitation rights to defendant.

(7) Ordering defendant to pay \$250 fees to plaintiff's attorney, the amount to be payable at the rate of \$50 per month.

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Defendant appealed.

Rudolph L. Edwards for plaintiff appellee.

Clayton, Myrick, McCain & Oettinger, by Grover C. McCain, Jr., and Kenneth B. Oettinger, for defendant appellant.

BRITT, Judge.

Defendant's first contention is that the court's findings of fact, that plaintiff is in need of support and subsistence during the prosecution of this action and that she is unable to defray the necessary costs of the prosecution, are not supported by the evidence. This contention is without merit. While the evidence as to plaintiff's income and expenses was minimal, considering the evidence, together with reasonable inferences arising thereon, in the light most favorable to the plaintiff, we hold that it was sufficient to support the findings.

[1] Defendant's second contention is that the court erred in granting alimony *pendente lite* and counsel fees when it made no factual finding that the plaintiff was entitled to the relief demanded. This contention has no merit. Based on sufficient evidence, the court found and concluded that on specific occasions defendant assaulted plaintiff and that defendant's treatment of plaintiff "... constituted a constructive abandonment as well as inflicting physical indignities on the plaintiff without legal cause or provocation on the part of the plaintiff." We hold that the court's findings and conclusions were sufficient.

[2] Defendant's third contention relates to the \$110 monthly payments of alimony; he contends that the court exceeded its authority in imposing the provision that "... the equity accruing from this date from the house payments will be that of the plaintiff alone. ..." We find no merit in this contention. Based on the evidence presented, the court was justified in ordering defendant to pay plaintiff \$110 per month alimony. Had the court ordered the money paid directly to plaintiff, she would be able to spend it for her sole benefit—for clothing, food, etc. The provision of the order challenged here not only makes certain that plaintiff is provided with shelter but that she receives the full benefit of the alimony while she spends money which she earns for food, clothing, and other necessities.

[3] Defendant's final contention is that the court exceeded its authority in ordering defendant to transfer the title to the

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Volkswagen to plaintiff. Defendant concedes that G.S. 50-16.7(a) (Supp. 1973) authorizes the payment of alimony *pendente lite* "... by transfer of title or possession of personal property or any interest therein. . . ." ; however, he argues that this section should be read in conjunction with G.S. 50-16.3(b) (Supp. 1973) which limits the payment of alimony *pendente lite* to the *pendency of the suit* in which the application is made. Assuming, *arguendo*, that defendant's argument might be valid in some cases, we do not think it has validity under the facts in this case. The evidence disclosed that there was a balance of \$1,500 owing on the 1973 Volkswagen, payable \$72 per month, and the order provided that plaintiff would make the payments. Based on those facts, we hold that the court did not exceed its authority.

For the reasons stated, the order appealed from is

Affirmed.

Judges CAMPBELL and VAUGHN concur.

PAUL REEVES v. DONALD MUSGROVE

No. 7423DC771

(Filed 6 November 1974)

Boundaries § 8; Trespass to Try Title § 1— processioning proceeding — appeal of reference — denial of title — action to try title — erroneous adoption of referee's report

When the trial court, before reviewing the report of the referee in a processioning proceeding, permitted defendant to amend his answer to deny plaintiff's title, the proceeding was converted into an action to try title; and since the issue of title did not arise until this stage, the report of the referee purporting to adjudge superior title in plaintiff could not be adopted by the trial court, and the action must be remanded for a determination of the issue of title.

APPEAL by defendant from *Osborne, Judge*, 14 May 1974 Session of District Court held in ALLEGHANY County.

Heard in Court of Appeals 17 October 1974.

This action was instituted by plaintiff alleging ownership of a tract of land described in his complaint and seeking the ejectment of defendant from a portion of that land. The original

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answer of the defendant admitted the title of plaintiff to the tract of land described in the complaint but asserted his own title to a tract of land described in his answer. When the case was reached for trial, the court, with the consent of both parties, ordered a reference.

Upon proper notice, a hearing was held before the referee on 17 January 1974, at which time both parties submitted evidence. On 5 February 1974 the referee made his report in which he concluded that plaintiff had a superior title to the land in dispute, awarded the land to the plaintiff, and directed the defendant immediately to remove his fences and vacate the property.

On 12 February 1974, defendant entered notice of appeal from the report of the referee and demanded a jury trial upon all issues. There were no specific exceptions to any findings of fact or conclusions of law in the referee's report, but the District Judge on 22 February 1974 directed that the case be placed on the next civil jury docket.

Upon the call of the case for trial at the 14 May 1974 session of the district court, plaintiff moved in open court for adoption of the report of the referee. Defendant moved to amend his answer so as to deny the title of plaintiff. Over objection of plaintiff, the defendant was allowed to amend his answer and deny the plaintiff's title. After his answer was amended the defendant then moved that the referee's report be "thrown out or disapproved in its entirety."

After reviewing the report of the referee, the court entered judgment substantially adopting the report and adjudging that plaintiff had superior title to the property in dispute.

From this judgment defendant has appealed.

Edmund I. Adams, for plaintiff appellee.

Arnold L. Young and Lewis Alexander for defendant appellant.

BALEY, Judge.

The record in this case is in a confusing state and difficult to understand. The answer of defendant originally admitted the plaintiff's allegation of ownership of land as set out in the complaint. The title of plaintiff was apparently not in dispute

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when the parties consented to the order of reference. When the matter was heard before the referee the action was in effect a processioning proceeding to determine a boundary line. *Pruden v. Keemer*, 262 N.C. 212, 136 S.E. 2d 604; *Prince v. Prince*, 7 N.C. App. 638, 173 S.E. 2d 567; 2 Strong, N. C. Index 2d, Boundaries, § 8, p. 12. The report of the referee, however, concluded that the title of plaintiff was superior to that of defendant and awarded plaintiff the disputed property.

Before the trial court reviewed the report of the referee on appeal, it permitted the defendant over objection by the plaintiff to amend his answer and deny the plaintiff's title. This converted the action from a processioning proceeding into an action to try title. Since the issue of title did not arise until this stage, the report of the referee—although purporting to adjudge a superior title in plaintiff—cannot stand. The hearing before the referee did not concern an action to try title. The transcript of the evidence before him does not disclose any deed to plaintiff or other documentary indicia of title in plaintiff and will not support a finding that plaintiff had title.

This cause must be returned for disposition after a consideration of all the issues raised by the pleadings as amended, which include the issue of title, and title must be shown in accordance with an accepted method of proof. *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142.

New trial.

Judges MORRIS and HEDRICK concur.

WELDIN TODD v. JOHN HENRY CREECH

No. 7413DC532

(Filed 6 November 1974)

1. Arrest and Bail § 5; Assault and Battery § 3— assault of prisoner after arrest — sufficiency of evidence

Plaintiff's evidence was sufficient for the jury in an action to recover for alleged assault and personal injuries sustained by plaintiff when he was arrested for public drunkenness where it tended to show that defendant, a policeman, entered plaintiff's cell after he had been arrested and struck plaintiff with a blackjack without provocation, causing a severe cut in the head and subsequent hospitalization.

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2. Arrest and Bail § 5— force in making arrest

While an officer in making an arrest and securing control of an offender has the right to use such force as may be reasonably necessary in the proper discharge of his duties, he may not act maliciously in the wanton abuse of his authority or use unnecessary and excessive force.

ON *certiorari* to review the Order of *Clark, Judge*, 3 December 1973 Session of District Court held in BLADEN County.

Heard in Court of Appeals 18 September 1974.

This is an action to recover damages for an alleged assault and personal injuries sustained by plaintiff during his arrest for public drunkenness.

At the conclusion of the evidence for plaintiff, the District Court granted defendant's motion for a directed verdict.

Plaintiff filed notice of appeal which was not perfected in apt time. This Court granted *certiorari*.

McGougan and Wright, by D. F. McGougan, Jr., for plaintiff appellant.

Attorney General James H. Carson, Jr., by Assistant Attorney General William W. Melvin and Assistant Attorney General William B. Ray, for defendant appellee.

BALEY, Judge.

[1] In ruling upon a defendant's motion for a directed verdict, the trial court must consider all the plaintiff's evidence in the light most favorable to him, giving to plaintiff the benefit of all reasonable inferences and resolving all conflicts in his favor. *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47. The motion may be granted only if the evidence is insufficient as a matter of law to support a verdict for the plaintiff. *Younts v. Insurance Co.*, 281 N.C. 582, 189 S.E. 2d 137; *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396. Applying this standard to the case at bar, we are of the opinion that the evidence is sufficient to warrant submission to the jury.

The testimony of the plaintiff, if believed, would permit a finding that defendant entered the jail cell after plaintiff was arrested and in custody, that defendant made statements to the effect that "I'll get him. I'll get the son-of-a-bitch," and that defendant struck plaintiff with a blackjack without provocation

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causing a severe cut in the head and subsequent hospitalization. Police officer Harley Williams testifying for plaintiff stated that he gave defendant his blackjack at defendant's request, that defendant took the blackjack into the cellblock, and that the blackjack was returned to him three or four minutes later. About five minutes after the blackjack was returned, he saw the plaintiff being carried to the hospital.

[2] While an officer in making an arrest and securing control of an offender has the right to use such force as may be reasonably necessary in the proper discharge of his duties, he may not act maliciously in the wanton abuse of his authority or use unnecessary and excessive force. *State v. Fain*, 229 N.C. 644, 50 S.E. 2d 904; *State v. Dunning*, 177 N.C. 559, 98 S.E. 530; 5 Am. Jur. 2d, Arrest, §§ 80, 81, pp. 766-68. Within reasonable limits the officer has discretion to determine the amount of force required under the circumstances as they appeared to him at the time he acted. But, when there is substantial evidence of unusual force, it is for the jury to decide whether the officer acted as a reasonable and prudent person or whether he acted arbitrarily and maliciously. *Perry v. Gibson*, 247 N.C. 212, 100 S.E. 2d 341; *State v. Pugh*, 101 N.C. 737, 7 S.E. 757. Under the circumstances as revealed by the evidence for the plaintiff, the jury could have found that defendant abused his authority and used excessive force to subdue plaintiff. It was error to direct a verdict for the defendant.

New trial.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. SEDRICK PAGE

No. 7414SC705

(Filed 6 November 1974)

Criminal Law § 146— escape of defendant — appeal dismissed

Defendant's appeal from a conviction of felonious possession of heroin is dismissed since defendant, who was serving a sentence imposed upon a conviction of larceny, escaped from the custody of the N. C. Department of Corrections and became a fugitive from justice.

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APPEAL by defendant from *Brewer, Judge*, 22 April 1974 Session of Superior Court held in DURHAM County. Heard in the Court of Appeals on 24 September 1974.

The defendant, Sedrick Page, was charged in a bill of indictment with the felonious possession of heroin. From a verdict of guilty and the imposition of a prison sentence of not less than three (3) nor more than five (5) years, defendant appealed to this court.

Attorney General James H. Carson, Jr., by Assistant Attorneys General H. A. Cole, Jr., and Thomas B. Wood for the State.

Edwards and Manson by Daniel K. Edwards for defendant appellant.

HEDRICK, Judge.

After this appeal was docketed and heard in this court, but before a decision was filed, the State, on 27 September 1974, filed a motion to dismiss the appeal on the grounds that the defendant, while serving a prison sentence for larceny imposed in a judgment entered on 15 August 1974 in Vance County, had escaped from the custody of the North Carolina Department of Correction and had become a fugitive from justice. The State supported its motion by an affidavit of Ben Baker, Supervisor of Combined Records of the North Carolina Department of Correction. Defendant's counsel filed answer to this motion.

"In appellate courts, where questions of law only can be reviewed, and in the absence of any statute specifically regulating the procedure, if there be satisfactory evidence that a defendant, whose appeal is founded upon exceptions entered on the trial below and has been regularly called for hearing, has escaped and is not in actual or constructive custody, it is clearly within the sound discretion of the Court to determine whether the exceptions shall be argued and passed upon, the appeal dismissed, or the hearing postponed to await the recapture of the alleged offender." *State v. Jacobs*, 107 N.C. 772, 774, 11 S.E. 962 (1890) (citations omitted).

Accord, *State v. Williams*, 263 N.C. 800, 140 S.E. 2d 529 (1965); *State v. Dalton*, 185 N.C. 606, 115 S.E. 881 (1923); *State v. Keebler*, 145 N.C. 560, 59 S.E. 872 (1907). This principle is not only recognized in North Carolina but appears to be well recog-

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nized throughout the United States. 24A C.J.S., Criminal Law, § 1825(4), p. 483.

Although this court has heard oral arguments on the defendant's appeal, we believe that the above quoted principle is sound authority upon which this court, in our discretion, can dismiss the defendant's appeal. Furthermore, the fact that the defendant has escaped from the prison sentence imposed due to the larceny conviction and not from the judgment imposed in the instant case does not prevent the dismissal of defendant's appeal. He is still a fugitive from justice and can no longer be made to comply with any judgment we may enter. At present, compliance with any decision of this court is in the discretion of the defendant. Therefore, as was said by Chief Justice Clark in *State v. Keebler*, *supra* at 562, 59 S.E. at 873, "[w]e will not deal with a defendant who is in the woods"; and we will dismiss the appeal.

Appeal dismissed.

Judges MORRIS and BAILEY concur.

STATE OF NORTH CAROLINA v. TYRONE GLENN AND MICHAEL
EUGENE BARR

No. 7426SC752

(Filed 6 November 1974)

Criminal Law § 113— joint trial — instructions as to guilt or innocence of each defendant

Where defendants were charged in separate but identical bills of indictment and their cases were consolidated for trial, the trial court's instruction as to each defendant on the essential elements that the State had to prove beyond a reasonable doubt before the individual defendants could be found guilty was proper.

APPEAL by defendant Glenn from *Falls, Judge*, 13 May 1974 Session of Superior Court held in MECKLENBURG County. Heard in the Court of Appeals 15 October 1974.

This is a criminal action in which the defendants were charged in separate but identical bills of indictment with the offense of robbery with a firearm of Charles W. Miller in viola-

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tion of G.S. 14-87. With the consent of the defendants the two cases were consolidated for trial. From a verdict of guilty as charged and the entry of judgment thereon, only defendant Glenn appealed.

Attorney General Carson, by Assistant Attorney General Magner, for the State.

Alexander Copeland III for defendant appellant.

MORRIS, Judge.

On appeal, defendant Glenn, the only appellant, contends that portions of the trial court's charge operated to deprive him of his right to have his individual guilt or innocence considered by the jury separate and apart from how the jury should find as to the other defendant. We disagree.

Our review of the record discloses that the trial court properly instructed the jury, as to each defendant, on the essential elements that the State had to prove beyond a reasonable doubt before the individual defendants could be found guilty. We find no merit in defendant's argument that in this case, the guilt or innocence of the two defendants was inexorably united by the opening and closing instructions of the court.

We recognize the principle that where two or more defendants, charged with the same offenses, are tried together, charges susceptible to the interpretation that a finding beyond reasonable doubt that either defendant committed the offense charged would demand a conviction as to all the defendants is reversible error. E.g., *State v. Waddell*, 11 N.C. App. 577, 181 S.E. 2d 737 (1971); *State v. Williford*, 275 N.C. 575, 169 S.E. 2d 851 (1969); *State v. Doss*, 5 N.C. App. 146, 167 S.E. 2d 830 (1969); *State v. Parrish*, 275 N.C. 69, 165 S.E. 2d 230 (1969); and cases cited therein. However, we do not find the charge in this case conveyed this idea to the jury. Without attempting to dissect each phrase of the charge challenged by the defendant, it is our opinion, and we so hold, that the charge here adequately apprised the jury of its responsibility as to each defendant separately. Defendant Glenn had a fair trial and his case was submitted to the jury under appropriate instructions upon applicable principles of law.

No error.

Judges HEDRICK and BAILEY concur.

State v. Brewer

STATE OF NORTH CAROLINA v. JASPER BREWER

No. 7426SC716

(Filed 6 November 1974)

Criminal Law § 116— failure of defendant to testify —. instructions

The trial court's instruction that "the same law also assures [defendant] that his decision not to testify will not be used against him. Therefore, you must be very careful not to allow his silence to influence your decision in any way" clearly instructed the jury that defendant's failure to testify did not create any presumption against him.

APPEAL by defendant from *Long, Judge*, 22 April 1974 Session of Superior Court held in MECKLENBURG County.

Heard in Court of Appeals 18 September 1974.

Defendant was tried upon an indictment charging armed robbery of Archie Burleson on 6 September 1973 in the warehouse office of Goodnight Brothers Trucking Company at Charlotte. He entered a plea of not guilty.

Three employees of Goodnight Brothers were eyewitnesses to the robbery and testified for the State. Two of these witnesses identified defendant as the man they saw strike Archie Burleson on the head, point a pistol at Burleson and others present, and require Burleson to give him cash and checks from the cash register and office safe.

Defendant did not testify. He relied upon an alibi and presented three witnesses who stated he was in their company at home at the time of the robbery.

The jury returned a verdict of guilty. From a judgment imposing a prison sentence of 16 to 20 years, defendant has appealed.

Attorney General James H. Carson, Jr., by Assistant Attorney General Charles A. Lloyd, for the State.

Blum and Sheely, by Michael A. Sheely, for defendant appellant.

BALEY, Judge.

Defendant assigns as error the form of the court's instruction to the jury concerning his failure to testify. While an

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instruction more nearly in the language of G.S. 8-54 is preferable, *State v. Powell*, 11 N.C. App. 465, 181 S.E. 2d 754, *cert. denied*, 279 N.C. 396, 183 S.E. 2d 243, the court used language which clearly conveyed to the jury that the failure of defendant to testify was not to create any presumption against him. The identical words used by the court in this case.

"The same law also assures him that his decision not to testify will not be used against him. Therefore, you must be very careful not to allow his silence to influence your decision in any way."

were held not to be prejudicial in *State v. House*, 17 N.C. App. 97, 98, 193 S.E. 2d 327, 328, and *State v. Phifer*, 17 N.C. App. 101, 103, 193 S.E. 2d 413, 414, *cert. denied*, 283 N.C. 108, 194 S.E. 2d 636.

Defendant also complains that the court improperly sustained the objection of the State to questions propounded to a State's witness on cross-examination. There are no answers in the record from which this Court can determine if any testimony excluded on cross-examination would have been prejudicial, *State v. Poolos*, 241 N.C. 382, 85 S.E. 2d 342, and the questions themselves call for highly speculative opinion on the part of the witness. *See generally* 1 Stansbury, N. C. Evidence 2d (Brands rev.), § 122.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIAM CARON HAMMOND

No. 7426SC579

(Filed 6 November 1974)

1. Burglary and Unlawful Breakings § 6— break-in of poultry cooler — instructions

In a prosecution for feloniously breaking and entering the cooler of a poultry company, the trial court did not express the opinion that the cooler had in fact been broken into and entered where the judge instructed that the State must prove that it was a building or storehouse which was broken into or entered and the judge inserted parenthetically the statement that "the Court instructs you that the cooler would be a storehouse."

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2. Criminal Law §§ 112, 122— reasonable doubt — additional instructions — repetition not required

In giving an additional instruction to the jury, the trial judge was not required to repeat that if the jury had a reasonable doubt they should return a verdict of not guilty, since the judge had given such an instruction fully in the main portion of his charge.

APPEAL by defendant from *Chess, Judge*, 4 March 1974 Session of Superior Court held in MECKLENBURG County.

Defendant, charged with felonious breaking or entering, was convicted of non-felonious breaking or entering and appeals from judgment imposing a 12-month prison sentence.

Attorney General James H. Carson, Jr. by Assistant Attorney General Norman L. Sloan for the State.

Lacy W. Blue for defendant appellant.

PARKER, Judge.

Appellant makes two assignments of error, both of which relate to additional instructions which the court gave to the jury after it had commenced its deliberations.

[1] The State's evidence showed that the place illegally entered was the cooler in the building of Southeastern Poultry of North Carolina, Inc., which contained approximately 1200 cases of chickens. In giving additional instructions which the jury requested on the elements of felonious and non-felonious breaking or entering, the judge correctly instructed the jury that one of the elements which the State must prove was that it was a building or storehouse which was broken into or entered. In giving this instruction the judge inserted, parenthetically, the statement that "[t]he Court instructs you that the cooler would be a storehouse." Defendant does not except to the quoted statement as such, but does contend that the judge violated G.S. 1-180 in seeming to express the opinion that the cooler in this case had in fact been broken into or entered. While a strained reading of the charge might grammatically support the construction which defendant now seeks to place upon it, this Court is not bound by the punctuation employed by the court reporter, and we find no reasonable possibility that the jury could have been misled into believing that the judge was expressing any opinion as to whether the evidence had established that the cooler had in fact been broken into or entered. Rather, we think the jury must have understood the quoted instruction to

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have the meaning which the judge obviously intended, i.e., that as a matter of law the cooler in question was such a structure as is referred to in G.S. 14-54. So understood, the instruction was correct and the judge did not violate G.S. 1-180.

[2] The second assignment of error is that the judge, in giving the additional instruction, failed to repeat that if the jury had a reasonable doubt they should return a verdict of not guilty of non-felonious breaking or entering. However, the judge had given such an instruction fully and clearly in the main portion of his charge, and it was not necessary that he repeat this as part of the additional instructions given to the jury.

In the trial and the judgment entered we find

No error.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. JOE CEPHUS CARR

No. 7414SC605

(Filed 6 November 1974)

Criminal Law § 122—urging jury to reach verdict—absence of coercion

Where the jury deliberated for some time and the foreman reported that they had made no progress toward a verdict for the preceding two hours, the trial court did not coerce a verdict when he stated that "if you don't agree upon a verdict, some other jury will have to be called in to decide it" and urged the jury to go back and deliberate further, notwithstanding the court failed to include an admonition that no member of the jury should surrender his conscientious convictions in order to agree upon a verdict.

APPEAL by defendant from *Chess, Judge*, 28 January 1974 Session of Superior Court held in DURHAM County.

Defendant was indicted for an assault with a deadly weapon with intent to kill inflicting serious injury. He was found guilty of assault with a deadly weapon inflicting serious injury, and from judgment imposing a two-year prison sentence, appealed.

Attorney General James H. Carson, Jr. by Assistant Attorney General Edwin M. Speas, Jr. for the State.

Clayton, Myrick & McCain by Jerry B. Clayton for defendant appellant.

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PARKER, Judge.

After the jury had deliberated for some time the foreman reported, in response to an inquiry from the judge, that for the preceding two hours they had made no progress toward a verdict. The judge then instructed the jury as follows:

"I'm going to let you go to lunch, at this time, and have you come back and resume your deliberations.

"You have heard all the evidence that any jury will be able to hear in the case, and if you don't agree upon a verdict, some other jury will have to be called in to decide it.

"The Court does not feel that any jury could be more competent to find the facts than this one, so for that reason, the Court is going to ask you to go back and deliberate further after lunch. And when you reach a verdict, let the Court know and I will have you brought in Court.

"All right. You may go now to lunch and report back in here at two o'clock, so that I can see that all of you are accounted for, and then you will go directly to the jury room."

Defendant complains that the foregoing charge was coercive and compelled an unwilling jury or some of its members to surrender their conscientious opinions in order to reach a verdict. We do not agree. Although the court failed to include an admonition that no member of the jury should surrender his conscientious convictions in order to agree upon a verdict, a cautionary warning which might have been necessary to cure a coercive instruction, *State v. McKissick*, 268 N.C. 411, 150 S.E. 2d 767 (1966), we do not find the instruction in the present case to be in any way coercive. On the contrary, it was entirely proper for the judge to ask the jury to go back and deliberate further. See cases cited in 3 Strong, N. C. Index 2d, Criminal Law, § 122. We find nothing said or done by the judge in this case which might have caused any member of the jury to surrender his own conscientious convictions in order to reach the verdict rendered.

No error.

Chief Judge BROCK and Judge MARTIN concur.

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STATE OF NORTH CAROLINA v. JEANETTE MARTHA GRIER

No. 7426SC680

(Filed 6 November 1974)

Constitutional Law § 32— right to counsel — finding of nonindigency — denial of continuance

Defendant's constitutional right to counsel was not abridged when the court on 4 February found defendant was not an indigent and entitled to the appointment of counsel upon evidence that defendant owned her own home, an automobile and furniture and appliances worth \$6,000, and when the court on 6 February denied defendant's motion for continuance on the ground that defendant had ample time following her indictment on 11 May the preceding year to employ counsel and prepare her case.

APPEAL by defendant from *Falls, Judge*, 6 February 1974 Session of Superior Court held in MECKLENBURG County.

On 1 October 1973, defendant was indicted for violating the North Carolina Controlled Substances Act, second offense. The indictment charged her with unlawful distribution of heroin on 11 May 1973.

On 4 February 1974, Judge Ervin conducted an inquiry as to appointment of counsel. During this inquiry, defendant stated that she owned her own home and a Buick Electra automobile. She further stated that she owned furniture and appliances worth approximately \$6,000.00. Based upon these and other facts tending to show defendant not to be indigent, the Court determined that defendant was not entitled to court appointed counsel.

On 6 February 1974, defendant's motion for continuance was denied after the Court determined that defendant had ample time following indictment to employ counsel and prepare her case.

Evidence for the State tended to show the following. An undercover agent with the North Carolina Bureau of Investigation was on assignment in Charlotte working with the Charlotte-Mecklenburg Vice Control Bureau. On 11 May 1973, the agent went with two other persons to 2100 Kenny Street in Charlotte to purchase heroin. He was introduced to defendant there. After observing the sale of heroin to one of the persons accompanying him, the agent purchased six bags of heroin from defendant.

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When the agent tried to buy a larger quantity, defendant urged the agent to go with her to New York for that purpose.

Defendant offered one witness, her cousin, who testified that she once saw defendant and the agent in the kitchen but had never seen drugs sold or used on these premises.

Upon a verdict of guilty of the offense of unlawful distribution of a controlled substance, heroin, first offense, defendant was sentenced to a prison term of not less than three nor more than five years. The sentence begins at the expiration of a previous five-year sentence defendant is required to serve. The previous sentence, originally suspended, was placed in effect because defendant had violated the terms of her probation by unlawfully possessing a firearm and unlawfully distributing heroin. She was represented by privately retained counsel at the hearing when her probation was revoked and does not appeal from that judgment, which was entered the same day she was sentenced in the trial from which she does appeal.

Attorney General James H. Carson, Jr., by John R. Morgan, Associate Attorney, for the State.

Levine & Goodman by Arthur Goodman, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant assigns as error that her motion for continuance was denied and that she was denied counsel at public expense. She does not contend that the judge abused his discretion when he denied the motion for continuance. Instead, it is argued that, as a matter of law, the motion should have been granted because the effect of denial was to deprive her of her constitutional right to counsel and that she need not show other prejudice. We cannot sustain this argument. There was ample time between indictment and trial for defendant to retain counsel and prepare her defense. The judge's findings on the question of defendant's indigency are supported by the evidence. Defendant's argument that she has been denied the right to counsel because of the absence of definite standards for determining indigency must also be rejected.

No error.

Judges CAMPBELL and BRITT concur.

Thompson v. Hamrick

RICKY RAY THOMPSON, A MINOR BY HIS GUARDIAN AD LITEM, RUBY THELMA THOMPSON, PLAINTIFFS v. MARY MOORE HAMRICK, DEFENDANT AND THIRD PARTY PLAINTIFF v. ROBERT JUNIOR THOMPSON AND BOBBY RAY THOMPSON, THIRD PARTY DEFENDANTS

No. 7429SC654

(Filed 6 November 1974)

Judgments § 36— parties concluded — res judicata inapplicable

An action by defendant Hamrick against plaintiff's father in which the jury found plaintiff's father negligent in the operation of his vehicle and defendant not contributorily negligent was not *res judicata* to this action by minor plaintiff against defendant Hamrick for damages sustained by plaintiff in the collision between defendant and his father, since plaintiff was neither a party nor one in privity with a party to the earlier action.

APPEAL by plaintiff from *Martin, (Harry C.)*, Judge, 22 April 1974 Session of Superior Court held in RUTHERFORD County.

Plaintiff, a minor, instituted this action by his duly appointed guardian ad litem against defendant Hamrick for damages sustained by plaintiff in an automobile accident.

Plaintiff was a passenger in a jeep operated by his father when it collided with a truck operated by defendant Hamrick.

In another action Hamrick had sued plaintiff's father as a result of the same accident. In that action the jury found plaintiff's father negligent and found that Hamrick was not contributorily negligent.

In the present case Hamrick moved for summary judgment against plaintiff on the grounds that the matters in dispute were finally determined by the verdict in the other case.

The judge concluded that there was an identity of parties, issues and subject matter in the two suits, and that "the issues as determined in the other suit constitutes (sic) *res judicata* to the present action and that the plaintiff is barred from recovery. . . ." Judgment was entered dismissing plaintiff's action.

Jones and Jones by B. T. Jones for plaintiff appellant.

Hamrick & Bowen by James M. Bowen for defendant appellee.

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VAUGHN, Judge.

Defendant's plea of res judicata in this case should have been sustained only if there was an identity of parties, subject matter and issues with the earlier case. The minor plaintiff in this case was neither a party nor one in privity with a party to the other action and, of course, he had no control over the other lawsuit. That his father was a party in the other action is irrelevant to this minor's right to prosecute his separate cause of action. The judgment from which plaintiff appealed is contrary to law and must be reversed.

Reversed.

Judges CAMPBELL and BRITT concur.

BUCK'S OIL COMPANY, INC. v. HOMER HORTON

No. 7410DC731

(Filed 6 November 1974)

1. Evidence § 29— admissibility of accounts and ledgers

In an action to recover the balance due on an account, a copy of a receipt from plaintiff's receipt book and certain ledger sheets were properly admitted for the purpose of proving that the sale of goods was made in the regular course of business at or near the time of the transaction involved where the documents were identified by a witness who was personally familiar with the entries on the documents and with the system under which they were made.

2. Trial § 57— nonjury trial — rules of evidence

Where the trial is by the court without a jury, the rules of evidence are not so strictly enforced as when tried by a jury, and it will be presumed that the judge disregarded the incompetent evidence unless the contrary affirmatively appears.

APPEAL by defendant from *Bullock*, District Court Judge, 29 April 1974 Session of District Court held in WAKE County.

This is a civil action to recover balance due on account for petroleum products sold and delivered over a period of years. Plaintiff alleged that defendant owed it the sum of \$4,151.05. Defendant answered denying the debt and pleading the statute of limitations as a bar to this action.

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Evidence for the plaintiff tended to show the following: that the account began in 1957, and as late as June, 1973, defendant asked plaintiff for oil; that on 28 October 1967, balance of said account was \$4,061.59 and that the balance today is \$4,151.05; that plaintiff forwarded defendant statements of the account and defendant never raised any objection thereto and in fact made payments on the account; and that plaintiff last received payment from defendant on 8 November 1972 in the amount of \$5.00. Plaintiff submitted entries from a ledger account kept by the corporation in the course of business and a copy of a receipt for a cash payment received in November, 1972.

Defendant's evidence tended to show that defendant did not make a \$5.00 cash payment on 8 November 1972; that defendant did not buy any gas or oil from plaintiff except on a cash basis since 1967; that defendant last paid on this account in November, 1966; and that defendant has not received a bill from plaintiff in the last three to four years. The trial court entered judgment for plaintiff in the amount of \$4,151.05, with interest from 8 November 1972.

Kirk & Ewell by Sam E. Ewell, Jr., for plaintiff appellee.

Vaughan S. Winborne for defendant appellant.

VAUGHN, Judge.

[1] In his first two assignments of error, defendant contends that the Court erred in admitting into evidence a copy of a receipt from plaintiff's receipt book and certain ledger sheets.

Each of these documents tends to prove the sale of goods was made in the regular course of business at or near the time of the transaction involved, and was identified by a witness who was personally familiar with the entries on the documents and with the system under which they were made. This being the case, each is admissible. *See* 3 Strong, N. C. Index 2d, Evidence, § 29.

[2] Defendant's third assignment asserts that the Court erred in the admission of certain other evidence. Where, as here, the trial is by the Court without a jury, the rules as to the competency of evidence are not so strictly enforced as when tried by a jury, and it will be presumed that the judge disregarded the incompetent evidence unless the contrary affirmatively appears.

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The Court found that defendant last made a payment on this account on 8 November 1972. This and the other findings of fact are supported by the evidence and are conclusive on appeal even though there is evidence to the contrary.

The findings of fact are sufficient to support the judgment which we must affirm.

Affirmed.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. KENNETH D. HALL

No. 744SC738

(Filed 6 November 1974)

Criminal Law § 166— assignments of error abandoned

Assignments of error not argued in defendant's brief are deemed abandoned. Court of Appeals Rule 28.

APPEAL by defendant from *Cowper, Judge*, 20 May 1974 Session of ONSLOW County Superior Court. Submitted 14 October 1974 on briefs to the Court of Appeals pursuant to Court of Appeals Rule 10.

Defendant was charged in warrants dated 23 March 1974 with careless and reckless driving, failure to reduce speed to avoid an accident, driving while under the influence of intoxicating liquor, and hit and run. The defendant pleaded not guilty.

The State's evidence tended to show that two Marines were riding on a motorcycle on U. S. 17; that after stopping at a stoplight beside a Cadillac, which the defendant was driving, they proceeded north; that they accelerated down the road and changed lanes so as to be driving in front of the defendant; that the defendant pulled into the left lane beside them and began easing over toward the motorcycle; that he eventually hit them causing the motorcycle to crash producing some \$779 damage; that the Cadillac sped off without stopping; that some other people chased after it and got the license number; that they returned and gave the number to the police officer at the scene; and that said officer went out and arrested the defendant.

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The defendant's evidence was to the effect that he was not driving the car that day. He offered two witnesses in corroboration.

The case was submitted to the jury on the issues of careless and reckless driving and leaving the scene. The judge had previously granted the defendant's motion as of nonsuit on the issues of failure to reduce speed and driving while under the influence. From a verdict of guilty on both counts and a judgment sentencing the defendant to twelve months in county jail, the defendant appeals.

Attorney General James H. Carson, Jr., by Assistant Attorney General Myron C. Banks for the State.

Edward G. Bailey for defendant appellant.

CAMPBELL, Judge.

The defendant makes two assignments of error in the record, but as these assignments are not argued in the brief, they are deemed abandoned. (Court of Appeals Rule 28.) However, an appeal is an exception to the judgment, presenting the face of the record proper for review. The record in this case consists of the warrant, the defendant's plea of not guilty, the evidence offered at trial, the jury verdict of guilty, and the judgment imposed. We have carefully reviewed this record and find no error.

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. PAUL HARRISON DOCKERY

No. 7428SC855

(Filed 6 November 1974)

Criminal Law § 161— appeal as exception to judgment

An appeal is an exception to the judgment presenting the face of the record proper for review.

State v. Dockery

ON *certiorari* from *Friday, Judge*, 27 February 1974 Session of BUNCOMBE County Superior Court. Heard in the Court of Appeals 22 October 1974.

Defendant was charged in a bill of indictment with armed robbery pursuant to G.S. 14-87. Defendant pleaded not guilty and was tried by a jury.

The State offered evidence that the defendant stole Cline Worley's wallet and eleven dollars (\$11.00) by threatening his life with a knife. The defendant thereafter fled with the property and was eventually apprehended.

The defendant's evidence was principally his own denial of the charges and other evidence that it was not the defendant who committed the crime.

The jury returned a verdict of guilty as charged. From a sentence of not less than five nor more than seven years, the defendant seeks a review.

Attorney General James H. Carson, Jr., by Assistant Attorney General George W. Boylan for the State.

Assistant Public Defender Robert L. Harrell for defendant appellant.

CAMPBELL, Judge.

As the appellant brings forward no assignment of error in the brief, it is deemed abandoned. See Court of Appeals Rule 28. However, an appeal is an exception to the judgment presenting the face of the record proper for review. In this case, the indictment was proper in form, the evidence supported the verdict of guilty as charged, and the judgment was supported by the verdict. We have carefully reviewed the record and find no prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

State v. Torrence

STATE OF NORTH CAROLINA v. LARRY EUGENE TORRENCE

No. 7419SC743

(Filed 6 November 1974)

Automobiles § 127— driving under the influence — sufficiency of evidence

Evidence in a prosecution for driving under the influence was sufficient to be submitted to the jury where it tended to show that a witness approached defendant who was leaning on the front fender of his car which was in a ditch, the car was still warm, defendant told officers that he was the driver of the car, in the opinion of the officers defendant was under the influence of intoxicants, and a breathalyzer test showed .24 percent weight of alcohol in defendant's blood.

APPEAL by defendant from *Exum, Judge*, 13 May 1974 Criminal Session of Superior Court held in ROWAN County.

Defendant was charged with driving a motor vehicle on a public highway while under the influence of intoxicating liquor and with public drunkenness. In district court, he pleaded not guilty but was found guilty of both charges. He appealed the driving under the influence charge to the superior court, where he pleaded not guilty. The jury returned a verdict of guilty as charged, and from judgment sentencing him to prison for four months, he appealed.

Attorney General James H. Carson, Jr., by Assistant Attorney General William B. Ray, for the State.

Archibald C. Rufty for the defendant.

BRITT, Judge.

Defendant's only assignment of error is that the court erred in failing to grant his motion for nonsuit at the close of all the evidence.

The evidence presented by the State (defendant offering no evidence) tended to show: Around 9:00 p.m. on 27 December 1973, witness Taylor received a telephone call from his neighbor advising that a car was in a ditch near the neighbor's house. Taylor called the sheriff and then he and the neighbor went to the car where they found defendant leaning on the front fender. The car was not damaged and was still warm; defendant stated that he was all right. Some five minutes later, Officer Dancy arrived and five minutes thereafter Officer Holcomb arrived. Defendant was weaving back and forth, had a very strong odor

State v. Alderman

of alcohol on his breath, and could not walk without assistance. Defendant told the officers that he was the driver of the car. In the opinion of the officers, defendant was under the influence of intoxicants. Defendant was taken to the Kannapolis Police Department where he was given a breathalyzer test which disclosed .24 percent weight of alcohol in defendant's blood.

We hold that the evidence was sufficient to withstand defendant's motion for nonsuit and the assignment of error is overruled.

No error.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. PHILLIP ALDERMAN

No. 745SC791

(Filed 6 November 1974)

Robbery § 4— armed robbery — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for armed robbery.

APPEAL by defendant from *Tillery, Judge*, 25 March 1974 Regular-Mixed Session of Superior Court held in PENDER County.

Defendant was charged in a bill of indictment, properly drawn, with the armed robbery of Tate Wesley Woodcock on 27 November 1973. He pleaded not guilty, the jury returned a verdict of guilty as charged, and from judgment imposing prison sentence of not less than 27 nor more than 30 years, defendant appealed.

Attorney General James H. Carson, Jr., by Assistant Attorney General Keith L. Jarvis, for the State.

Gary E. Trawick for defendant appellant.

BRITT, Judge.

The sole assignment of error brought forward and argued in defendant's brief is that the court erred in not granting his motions for nonsuit. He contends that while the evidence was

State v. Millander

sufficient to show that the offense charged was committed, the evidence was insufficient to show that defendant was the person, or one of the persons, who committed the offense.

We have carefully reviewed the evidence presented at the trial and considering it in the light most favorable to the State as is required on motions for nonsuit, we conclude that it was sufficient to survive the motions. No worthwhile purpose would be served in narrating the evidence here.

We hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. WILLIE ALFRED MILLANDER
AND NORMAN M. WRAY

No. 744SC770

(Filed 6 November 1974)

ON *certiorari* to review the trial of defendants before *Cochoon, Judge*, at the 21 May 1973 Session of Superior Court held in ONSLOW County. Heard in the Court of Appeals on 15 October 1974.

The defendants, Willie Alfred Millander and Norman M. Wray, were charged in separate bills of indictment, proper in form, with feloniously assaulting Steven C. Maddox with deadly weapons with intent to kill inflicting serious bodily injury. Both defendants were found guilty as charged. On 24 May 1973 the trial court entered judgment sentencing each defendant to ten (10) years in prison. On 28 June 1974 this court allowed defendant Millander's petition for a writ of *certiorari* to perfect a late appeal, and on 10 July 1974 this court allowed defendant Wray's petition for a writ of *certiorari* to perfect a late appeal.

James H. Carson, Jr., Attorney General, by Assistant Attorney General Charles M. Hensey for the State.

No counsel contra.

State v. Elliott

HEDRICK, Judge.

The record on appeal contains no exceptions or assignments of error. Nevertheless, the appeal itself presents the face of the record proper for review. Accordingly, after examining the record proper, we find that the court trying the defendants was properly organized and the bills of indictment are proper in form. The verdicts are proper, conform with the bills of indictment, and support the judgments entered. The prison sentences imposed are within the limits prescribed by statute for the offenses charged. No error appears on the face of the record proper.

No error.

Judges MORRIS and BAILEY concur.

STATE OF NORTH CAROLINA v. CARL ELLIOTT AND MILTON
EDGERTON

No. 7429SC603

(Filed 6 November 1974)

APPEAL by defendants from *Martin (Robert M.)*, Judge, 18 March 1974 Session of Superior Court held in RUTHERFORD County. Heard in the Court of Appeals 14 October 1974.

Defendants were charged in separate bills of indictment with the felony of possession of marijuana with intent to distribute. Pleas of not guilty were entered, and verdicts of guilty as charged were returned. From active sentences of not less than twelve months nor more than eighteen months imposed thereon, each defendant gave notice of appeal.

Attorney General Carson, by Assistant Attorney General Hamlin, for the State.

George R. Morrow, for the defendants.

BROCK, Chief Judge.

Defendants present the record for review for possible errors. We have carefully reviewed the record. It is our opinion that defendants had a fair trial free from prejudicial error.

State v. Lee

No error.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. JIMMY LEE

No. 746SC809

(Filed 6 November 1974)

DEFENDANT appeals from *Peel, Judge*, June 1974 Session of Superior Court held in HALIFAX County.

By a bill of indictment, proper in form, defendant was charged with the kidnapping of John Jackson Edwards on 2 May 1974. Defendant pleaded not guilty, a jury found him guilty as charged, and the court entered judgment sentencing him to prison for a term of not less than 23 years nor more than 26 years, the sentence to begin at expiration of all sentences he was serving at the time the judgment was entered. Defendant appealed.

Attorney General James H. Carson, Jr., by Associate Attorney James E. Delany, for the State.

Allsbrook, Benton, Knott, Allsbrook & Cranford, by Dwight L. Cranford, for defendant appellant.

BRITT, Judge.

While defendant assigns no error, we have carefully reviewed the record in this case and find that it is free from prejudicial error. Defendant received a fair trial and the sentence imposed is within the limits allowed by statute.

No error.

Judges CAMPBELL and VAUGHN concur.

State v. Johnson

STATE OF NORTH CAROLINA v. JACK EDWARD JOHNSON

No. 7425SC648

(Filed 6 November 1974)

APPEAL by defendant from *Thornburg, Judge*, 28 January 1974 Session of Superior Court held in CATAWBA County. Heard in the Court of Appeals on 21 October 1974.

Defendant pleaded not guilty to separate indictments charging crimes against nature. From a verdict of guilty and a sentence of ten years in prison, defendant appealed.

Attorney General Carson, by Assistant Attorney General H. A. Cole, for the State.

Sigmon and Sigmon, by W. Gene Sigmon, for defendant appellant.

MARTIN, Judge.

Defendant presents the record for review for possible errors. We have done so and find no prejudicial error.

No error.

Chief Judge BROCK and Judge PARKER concur.

In re Appeal of AMP, Inc.

IN THE MATTER OF THE APPEAL OF AMP, INCORPORATED,
FROM THE DECISION OF THE STATE BOARD OF ASSESS-
MENT, SITTING AS THE STATE BOARD OF EQUALIZATION
AND REVIEW, AFFIRMING THE ACTION OF THE GUILFORD
COUNTY BOARD OF COMMISSIONERS ASSESSING ADDI-
TIONAL TAXES, PENALTIES AND INTEREST FOR THE
YEARS 1964 THROUGH 1968, INCLUSIVE

No. 7418SC444

(Filed 20 November 1974)

1. Taxation § 25— valuation — true value in money

As used in former G.S. 105-294, the test of true value in money in such manner as such property is usually sold, but not by forced sale thereof, is the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

2. Taxation § 25— ad valorem taxes — electronics manufacturer — goods in process and raw materials — valuation

The value for ad valorem taxation of the goods in process and raw materials of an electronic components manufacturer was not the scrap value of the goods and materials, since such value would be predicated upon a forced sale, and the goods and materials were properly assessed at their book value for purposes of ad valorem taxation. G.S. 105-294 (now G.S. 105-283).

3. Taxation § 38— attack on assessment — burden of proof

The *prima facie* correctness of an assessment made by proper taxing authorities must be affirmatively overcome by the taxpayer by allegation and proof excluding every reasonable hypothesis of legal assessment.

4. Administrative Law § 5— review of administrative decision

The superior court may reverse or modify the decision of an administrative agency if the decision is unsupported by competent, material and substantial evidence in view of the entire record as submitted; the agency's decision should be upheld if the evidence supporting the decision is substantial.

5. Taxation § 38— valuation by State Board of Assessment — erroneous reversal by superior court

The superior court erred in reversing and vacating a determination by the State Board of Assessment that a taxpayer had undervalued its inventory for certain years where there was competent, material and substantial evidence in the record to support the Board's determination.

APPEAL by respondent Guilford County from *Exum, Judge*, 25 September 1972 Session of Superior Court held in GUILFORD County. Argued before the Court of Appeals 26 August 1974.

 In re Appeal of AMP, Inc.

AMP, Incorporated, is a corporation engaged in the manufacture of electronic components in Guilford County and in other locations within and without North Carolina. AMP duly and timely filed with the Guilford County Tax Supervisor "Business Property Abstracts" in accord with G.S. 105-309 for the taxable years 1964 through 1968 inclusive. AMP made timely payments of the taxes for which it was billed as follows:

1964	\$11,555.73
1965	11,724.06
1966	12,026.60
1967	13,534.23
1968	13,044.07

Included in the abstracts were the following valuations for current inventories:

1964	\$399,278.00
1965	448,101.00
1966	460,734.00
1967	454,801.00
1968	238,651.00

The Tax Supervisor of Guilford County, purporting and claiming to act under the authority of G.S. 105-331 (now G.S. 105-312), increased the valuation of the inventories to the following amounts:

1964	\$ 477,769.00
1965	843,327.00
1966	1,205,369.00
1967	1,565,711.00
1968	1,402,489.00

The tax supervisor accordingly assessed AMP for additional taxes, penalties, and interest for the undervaluation of inventory as follows:

<i>Year</i>	<i>Tax</i>	<i>Penalty</i>	<i>Total</i>
1964	\$ 653.83	\$ 392.30	\$ 1,046.13
1965	3,472.06	1,736.03	5,208.09
1966	6,619.81	2,647.92	9,267.73
1967	9,992.64	2,997.79	12,990.43
1968	11,039.00	2,207.80	13,246.80
			<u>\$41,759.18</u>

In re Appeal of AMP, Inc.

The valuation of inventories in the assessment was arrived at by the Tax Supervisor and the Board of County Commissioners of Guilford County, which affirmed the assessment, by referring to inventories as shown on North Carolina income tax returns filed by AMP with the State and then deducting therefrom inventories reported to Forsyth County, Mecklenburg County, and Wake County, the balance being attributed to Guilford County.

AMP gave notice of appeal to the State Board of Assessment sitting as the State Board of Equalization and Review (now Property Tax Commission, G.S. 105-288).

At the hearing before the State Board of Assessment, sitting as the State Board of Equalization and Review, appellee AMP introduced evidence which it contends establishes the true cash value of its inventory. Herbert Cole, plant manager for AMP, described the process by which electronic components are produced from brass, copper, and other metals. Metals are purchased in strips approximately five to eight inches wide, which are coiled in large rolls of varying thickness. These coils, upon arrival at the AMP plant in Greensboro, are mechanically slit into narrow strips and are rolled into "pancake" rolls. These are processed through forming dies in order to manufacture a particular terminal, which, in turn, is metal plated. At its Greensboro plant AMP manufactures various types of solderless connectors with terminals which are used in the electronics industry to terminate wires contained in electronic equipment. AMP furnishes its customers with devices which cannot be used until each customer purchases application equipment designed and manufactured by AMP.

In the slitting, forming die, and metal plating stages of manufacture, scrap results due to a number of punching and cutting operations performed upon the metal. Raw material is also scrapped when it is damaged in handling. When 40,000 pounds of scrap have accumulated, AMP contacts its main office in Harrisburg, Pennsylvania, which sells the scrap to suppliers from whom the raw materials were originally purchased. AMP generally ships 40,000 pounds of scrap per week to its suppliers. About 50% of AMP's raw material eventually reduced to scrap; about 40% of the costs of the raw materials is recouped upon sale of scrap to the original suppliers.

Ernest Price, tax manager of AMP, described the method of computation used by AMP in determining the true cash value

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of its inventory. True cash value is computed by deducting from book value direct labor and overhead. The full amount of scrap is then deducted from the in-process material in order to compute true material content. True cash value of the inventories consists of the value that can be realized upon a sale of the raw materials and the goods in process. Dollar figures are determined by comparison of a detailed inventory list to published prices.

In his testimony before the State Board of Assessment, Price emphasized that, due to the nature of products manufactured, AMP's electronic components have only scrap value until the manufacturing process is completed:

"When goods are in process at any stage, halfway through or 90% through, on January 1 of any year, the customer will not accept the item, and you cannot sell it to the customer. He cannot use it. The only place we can use it is to sell it back to the supplier and the only thing the supplier will be receiving is some metal. He doesn't care about the labor and overhead. We have metal for him and what he will pay is the value of the metal. . . . The law of the State asked us what we can get for goods in process on a given date and the answer is that we can get the value of the materials which is scrap value. . . . Raw materials are valued at scrap as well as in-process inventories. There are no other manufacturers of similar products who would buy these substantially at cost, because we have a very peculiar product. It is highly engineered and specifications of those materials are not like cotton or textiles. We have a very special raw material with a very special type of specification and generally speaking no one else can use them because they are made for our specific product."

AMP employed the professional appraisal firm of Dawson, Desmond and Van Cleve, specialists in the appraisal of personal property, to determine true cash value of the inventories for the years 1964 through 1968 inclusive. The Dawson firm listed AMP's ad valorem taxes in each of those years and was retained by AMP solely because AMP did not know how to find the true cash value of its inventory. When appellant Guilford County notified AMP that additional taxes on inventories were owing, AMP began to calculate for itself the value of its inventories. AMP's own calculations show that the Dawson firm overvalued inventories in the years 1964 through 1968 inclusive by \$454,718.00.

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This discrepancy is attributable to the fact that the Dawson firm "failed to recognize that our raw materials were so unique that we do get nothing but scrap for them." There is no evidence of the Dawson firm's method of computation of the value of inventory.

AMP introduced the expert testimony of William Westphal, a specialist in taxation, who stated: "[H]ere, we are not using a method (of valuation) that anticipates a completion of the goods. We are not assigning an accounting technique, a going concern value to this inventory on the assumption that this is what it is worth to this taxpayer in the course of trade or business. We are trying to determine what the cash value would actually be, and I think these sales prices are the best evidence of the amount into which these goods could be transmuted." Westphal expressed the opinion that G.S. 105-294 (now G.S. 105-283) refers clearly to cash value which is not determined on a forced sale basis, but is determined by calculating "the cash into which these subjects, these properties, might be transmuted at that specific date if sold . . . in an orderly manner following the general procedures of the firm." Westphal testified that book value is used to measure income on certain financial statements, but does not necessarily represent value in cash.

Appellant Guilford County, in the hearing before the State Board of Assessment, introduced the testimony of C. R. Brooks, Tax Supervisor for Guilford County, who stated that the instructions contained in the business property returns required that values should be given to the County directly from the records of the books of a taxpayer. Brooks stated that State income tax reporting and County ad valorem tax reporting is on the same basis, or should be on the same basis. Appellant's further evidence is the testimony of Ronald Waters, Assistant Tax supervisor from 1965 to 1969, who stated that during this period he audited a number of businesses, 95% of which reported property with values for ad valorem tax purposes consistent with the values given to the State for income and franchise tax purposes.

By order of 5 May 1970, the State Board of Assessment found that the value of AMP's inventory for ad valorem tax purposes was represented by the figures reflected in its books and records and that the differences between the book values and the amounts listed for ad valorem tax purposes constituted "unlisted property" and was therefore subject to discovery and

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assessment of additional taxes and penalties under G.S. 105-331. The State Board found that the differences between AMP's actual inventory in Guilford County, as reflected by its books and records and the amounts reported to the County by AMP for the years 1964 through 1968, were subject to taxation. The additional amount subject to taxation was determined as follows:

Year	Actual Inventory in Guilford County	Amount of Inventory Listed by AMP	Additional Amount of Inventory Subject to Tax
1964	\$ 464,758.00	\$399,278.00	\$ 65,480.00
1965	1,034,066.00	448,101.00	585,965.00
1966	1,012,055.00	460,734.00	551,321.00
1967	614,604.00	454,801.00	159,803.00
1968	400,725.00	238,651.00	162,074.00

The State Board's decision in effect sustained the actions of the Tax Supervisor and the Board of County Commissioners of Guilford County. AMP subsequently appealed to the superior court, which reversed and vacated the decision of the State Board on the grounds that its decision was not supported by competent, material, and substantial evidence and was affected by errors of law. From the superior court's judgment, respondent Guilford County appealed to this Court.

Adams, Kleemaier, Hagan, Hannah & Fouts, by William J. Adams, Robert G. Baynes, and Paul H. Livingston, for AMP, Incorporated, petitioner-appellee.

Ralph A. Walker, for Guilford County, respondent-appellant.

Attorney General Carson, by Assistant Attorney General Banks, for Property Tax Commission, amicus curiae.

BROCK, Chief Judge.

Appellant contends that the superior court committed error when it found that the decision of the State Board of Assessment was not supported by competent, material, and substantial evidence. In order to resolve this question, we have examined in detail the evidence offered by the parties at the hearing before the State Board of Assessment.

The basic controversy involves the interpretation of G.S. 105-294 (now G.S. 105-283), which furnishes the standard by which property is to be valued:

"All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. The

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intent and purpose of this section is to have all property and subjects of taxation appraised at their true and actual value in money, in such manner as such property and subjects of taxation are usually sold, but not by forced sale thereof; and the words 'market value,' 'true value,' or 'cash value,' whenever used in this chapter, shall be held to mean for the amount of cash or receivables the property and subjects can be transmuted into when sold in such manner as such property and subjects are usually sold." N. C. Gen. Stat. ch. 105, § 294 (1967), *as amended*, N. C. Gen. Stat. ch. 105, § 283 (1973).

[1] The important provision of G.S. 105-294 is the requirement that property is to be appraised at its true and actual value in money, in such manner as such property is usually sold, but not by forced sale thereof. We believe that the best and most reasonable test of true value in money, in such manner as such property is usually sold, but not by forced sale thereof, is the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used. The present statute, G.S. 105-283, effective January 1, 1974, adopts such a test.

At the hearing before the State Board of Assessment, appellee strongly contended that its in-process inventory should have been appraised at cash realizable value, a value determined by a sale of goods in process "in their presently existing state at this particular time." Appellee's expert in the field of taxation, William Westphal, stated that "here, we are not using a method that anticipates a completion of the goods. We are not assigning . . . a going concern value to this inventory. . . . We are trying to determine what the cash value would actually be, and I think these sales prices (scrap value) are the best evidence of the amount into which these goods could be transmuted."

[2] The statement by appellee's expert that appellee is not assigning a going concern value to its inventory, but instead is assigning a scrap value to its inventory, contradicts the express requirement of G.S. 105-294 that true value in money is not to be the value arrived at by forced sale. Implicit in G.S. 105-294 is the going concern assumption. All the evidence introduced

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by appellee at the hearing before the State Board of Assessment recognized that a forced sale would not measure true value in money. Yet, by failing to assign a going concern value to work in process and by arguing for a value determined by calculating the cash into which work in process might be transmitted at a specific date, appellee in effect constructed and used a valuation predicated upon a forced sale. This ignores the provisions of G.S. 105-294.

At the hearing appellee introduced evidence to the effect that it does not sell goods in process in the normal course of business. Evidence does exist that, in the few instances when appellee sold work in process, it sold such work in process to the original suppliers of raw materials for scrap value. No evidence was introduced to explain why work in process was disposed of rather than completed. The goods in process must have been unsuitable for completion, or appellee would not have sold the goods in process prematurely at a value below cost. There is no evidence that a similar situation exists with respect to appellee's entire inventory.

Appellee does not contend that it would willingly sell its entire inventory, the subject matter of this appeal, at scrap value. Appellee is a going concern and has plans to complete its work in process. It seems clear that no manufacturer would willingly sell its in-process inventory at scrap value unless it had abandoned plans for completing and selling the in-process inventory for a reasonable profit or for a recovery of cost. The burden of proof is on the manufacturer to prove that the book value (cost) assessment made by the taxing authority is excessive. In this case appellee has not carried that burden.

Other jurisdictions have adopted a cost approach to the valuation of goods in process. In *Aeronautical Communications Equipment, Inc. v. Metropolitan Dade County*, 219 So. 2d 101 (Fla. Dist. Ct. App. 1969), cert. denied, 225 So. 2d 911 (Fla. 1969), the taxpayer was an electronics company which manufactured specialized radio equipment. It assembled, cut, soldered, and altered hundreds of component parts and materials in the process of assembling its finished products. Partially finished work could not be disassembled for any other use or purpose. The taxpayer manufactured only against orders and did not maintain an inventory for future sale. If a purchaser did not take equipment when completed, the equipment, being of little use to another purchaser, had only scrap value. The

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taxpayer, in attempting to show that "book value" as computed by the Florida Tax Assessor had no relation to "actual value," admitted that there was no going market for its products. The taxpayer claimed that its inventory had only "junk value," but no more than 2% of the inventory had ever been junked, and 98% had ultimately been sold, at a profit, to willing buyers. The court noted that as certain items such as labor were applied to the raw materials of the taxpayer, the value of the raw materials appreciated. The court, in adopting a valuation method based on cost, stated: "In the instant case . . . the Plaintiff's stock in trade consists of work in process, the value of which (cost of which) is increased as it is processed. . . . The original purchase price (invoice price) thus is not the fair market value of the inventory herein." 219 So. 2d at 105. In a New Hampshire case concerning the proper valuation of inventory, the court rejected the argument that goods in process could be valued at scrap value:

"Among other arguments advanced by the plaintiff for excluding goods in process from taxation (as stock in trade) is that during the transitory period from raw material to finished product goods in process have no sale value except in liquidation at liquidation values as unfinished goods or goods finished at excess costs. . . .

. . . .

"To require the selectmen to place a forced sale value upon goods in process and uncompleted would ignore the purpose of the statute and offend the principle that taxation is to be administered in a practical way." *Verney Corporation v. Peterborough*, 104 N.H. 368, 372-73, 188 A. 2d 50 (1962), *aff'd on rehearing*, 104 N.H. 375 (1963).

[2] At the hearing before the State Board of Assessment, appellee strongly contended that its raw materials, as well as its work in process, should have been valued at scrap value. Appellee's tax manager, Ernest Price, stated that there were no manufacturers of similar products who would purchase the raw materials substantially at cost due to the peculiar nature of the materials: "We have a very special raw material with a very special type of specification and generally speaking no one else can use them because they are made for our specific product." Evidence adduced at the hearing indicates that upon sale of raw materials to the original suppliers, 40% of the cost of

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the raw materials is recouped. The effect of appellee's contention is that raw materials purchased for \$10,000.00 have a value of \$6,000.00 when they arrive at the manufacturing plant and are placed into inventory. Appellee admits that it is not in the business of selling raw materials and that it does not sell its raw materials as scrap. Its witnesses acknowledged that G.S. 105-294 requires valuation at true value in money not at forced sale, but stated that true value in money is best represented by appellee's sales of raw materials as scrap. Such a position is untenable. G.S. 105-294 expressly states that "'true value' . . . shall be held to mean for the amount of cash or receivables the property and subjects can be transmuted into when sold in such manner as such property and subjects are usually sold." Raw materials are not usually sold as scrap, and the book value (cost), in this instance, is the best evidence of their true value in money.

It is a sound and fundamental principle of law that assessments are presumed to be correct, and the burden of proof to the contrary must necessarily rest with the taxpayer. "It is incumbent upon the property owner clearly to show that the assessment was erroneous, in order to relieve himself from it." 72 Am. Jur. 2d, *State and Local Taxation*, § 713 (1974). Furthermore it has been held in one jurisdiction, in a case concerning the valuation of certain timber lands, that:

"It is not enough to show that some method other than that adopted by the assessor in making the assessment would be better. In such case it must be shown that the means adopted by that official are wrong and that the result arrived at is greater than the actual cash value of the property assessed

.

"It appears to be a firmly established rule that the valuation placed upon property by the assessor for the purpose of taxation is *prima facie* correct, and a party assailing such an assessment as excessive must make it clearly appear that the assessment does not represent the fair value of the property assessed." *Weyerhaeuser Land Co. v. Board of Equalization*, 85 Or. 434, 442-43, 165 P. 1164 (1917).

We believe that this principle applies in the case *sub judice*.

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[3] We recognize that cost may not always represent "true value in money" as defined in G.S. 105-294. Where cost, for example, contains unnecessary costs of production or overhead not properly associated with the product; where there is evidence that inventory is obsolete and not worth cost; where replacement cost is below cost due to cheaper raw materials or new and more efficient production techniques; and where the manufacturer is not a going concern and a forced sale is anticipated, then cost may not necessarily be evidence of true value in money. In North Carolina the taxpayer has a right to show that his property is worth less than the valuation made by the taxing authority. If such a showing is made, the taxpayer will be taxed on the lower basis. *In re Carolina Quality Block Company*, 270 N.C. 765, 155 S.E. 2d 263. However, we believe, and so hold, that "[t]he prima facie correctness of an assessment when made by the proper officers must be affirmatively overcome by appropriate and sufficient allegations and proofs excluding every reasonable hypothesis of legal assessment." *Aeronautical Communications Equipment, Inc. v. Metropolitan Dade County*, 219 So. 2d 101, 104 (Fla. Dist. Ct. App. 1969), citing *Folsom v. Bank of Greenwood*, 97 Fla. 426, 120 So. 317 (1929). Appellee has failed to overcome its burden. In our opinion there is competent, material, and substantial evidence to support the decision of the State Board of Assessment that appellee undervalued its inventory for the years 1964 through 1968 inclusive. For this reason appellant's assignment of error is meritorious.

Appellant contends that the superior court exceeded its scope of review when it reversed and vacated the decision of the State Board of Assessment. Article 33 of Chapter 143 of the General Statutes provides for judicial review of the decisions of administrative agencies. Specifically G.S. 143-315 establishes the proper scope of review:

"The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or

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- (4) Affected by other error of law; or
- (5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

"If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification."

[4] It is within the prerogative of the court, and it is its duty, to examine the evidence and reverse or modify the decision of an administrative agency if the decision is unsupported by competent, material, and substantial evidence in view of the *entire* record as submitted. Only the evidence supporting the administrative agency's decision need be looked to; if it is substantial, then the decision of the agency should be upheld. See Hanft, *Some Aspects of Evidence in Adjudications by Administrative Agencies in North Carolina*, 49 N.C. L. Rev. 635 (1971).

The North Carolina Supreme Court has stated in this respect that upon review of an order of the State Board of Assessment, the superior court is without authority to make findings at variance with the findings of the State Board when the findings of the State Board are supported by material and substantial evidence. *In re Property of Pine Raleigh Corp.*, 258 N.C. 398, 128 S.E. 2d 855. Furthermore, the superior court is without authority to make findings at variance with the findings of the State Board which are supported by substantial evidence because that is the exclusive function of the State Board of Assessment. *In re Appeal of Reeves Broadcasting Corp.*, 273 N.C. 571, 160 S.E. 2d 728. Courts will interfere with tax assessments because of asserted violations of the due process clause only when the actions of the State Board of Assessment are found to be arbitrary and capricious. *Albemarle Electric Membership Corp. v. Alexander*, 282 N.C. 402, 192 S.E. 2d 811. Accordingly a superior court exceeds its right of review where it substitutes its evaluation of the evidence for that of the Board. *Clark Equipment Co. v. Johnson*, 261 N.C. 269, 134 S.E. 2d 327.

[5] Having found that there is competent, material, and substantial evidence in the record from which the State Board of Assessment could reach a valid conclusion that appellee under-

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valued its inventory for the years 1964 through 1968 inclusive, we find that the judgment of the Superior Court reversing and vacating the State Board of Assessment's decision was error. The judgment of the superior court is reversed, and the cause is remanded to the superior court for an order reinstating and affirming the decision of the State Board of Assessment.

Reversed and remanded.

Judges MORRIS and MARTIN concur.

REDEVELOPMENT COMMISSION OF THE CITY OF GREENVILLE,
PETITIONER v. UNCO, INCORPORATED; SAM B. UNDERWOOD
AND WIFE, ALMA W. UNDERWOOD; WACHOVIA BANK AND
TRUST COMPANY, EXECUTOR OF THE ESTATE OF W. H.
WOOLARD; COUNTY OF PITT; AND THE CITY OF GREEN-
VILLE, RESPONDENTS

No. 733SC794

(Filed 20 November 1974)

1. Eminent Domain § 7—urban redevelopment plan—condemnation of publicly owned land

Though more than half of a parcel of land which petitioner sought to have condemned for an urban renewal project was already in public ownership, as were three of the six buildings on the land, appellants cannot contend that there was no statutory authority for the present proceeding to condemn their land which was included in the parcel, since the Urban Redevelopment Law specifically provides that publicly owned property may be acquired by condemnation in furtherance of an urban renewal project when the owning public body gives its consent. Former G.S. 160-465.

2. Eminent Domain § 7—urban redevelopment plan—statutory standards followed

The Redevelopment Commission and the City Council of the City of Greenville did not act arbitrarily or capriciously in adopting and approving the plan of redevelopment or the amendment to include the parcel of which appellants' land was a part where (1) the Commission acted under express statutory authority to cooperate with any government or municipality, including conveying real property to the municipality, (2) the elaborate procedure detailed by statute whereby an urban redevelopment plan is formulated, reviewed, and approved was carefully adhered to both when the plan was originally approved and when it was amended, and (3) there was sufficient evidence to support the trial court's finding that the parcel of land in question

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was a blighted area within the meaning of the statute, even though there was evidence that appellants' lot and building located within that parcel were in good condition.

3. Rules of Civil Procedure § 41— motion to dismiss at close of evidence — consideration on appeal waived by subsequent introduction of evidence

By introducing evidence, respondents waived the right to have reviewed on appeal the question whether their motion for involuntary dismissal under Rule 41(b) made at the close of petitioner's evidence was erroneously denied.

4. Appeal and Error § 30— admission and exclusion of evidence — sufficiency of assignments of error

Assignments of error to the exclusion and admission of evidence which did not show specifically what question appellants intended to present for consideration by the court on appeal without the necessity of going beyond the assignments themselves were ineffectual to bring up for review any of the trial court's rulings admitting or excluding evidence.

APPEAL by respondents from judgment dated 10 May 1973 entered by *Tillery, Judge*, after hearing at the 26 February 1973 Session of Superior Court held in PITT County.

Special proceeding to condemn land for an urban renewal project. Prior to 1966 the Greenville City Council approved the Shore Drive Redevelopment Project, an urban renewal plan formulated by the City's Redevelopment Commission and certified by the City's Planning and Zoning Commission under the provisions of the North Carolina Urban Redevelopment Law, G.S. 160-454 et seq. (now G.S. 160A-500 et seq.). The plan designated as a "blighted area" a portion of downtown Greenville bounded on the north by Tar River and on the south by Second Street. No question is raised on this appeal concerning any land in the project as originally approved.

On 28 December 1966 the City Council adopted an amended plan which added certain areas to the project. One of these, identified as Parcel 13, contains the property which is the subject matter of the present litigation. Parcel 13 consists of approximately the northern half of a city block and is bounded on the north by Second Street, on the south by Courthouse Lane, on the east by Evans Street, and on the west by Washington Street. The southern half of the block is occupied by the Pitt County Courthouse. On 28 December 1966 Parcel 13 contained six structures: A building formerly used as a Catholic Church, the National Guard Armory, the Edwards Building, the Dudley house, the Buck house, and the building owned by respondent Unco,

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Incorporated, which is the subject of this litigation. In 1966 Pitt County held title to the Edwards Building and the Buck house and, with the City of Greenville, the Armory (subject to the rights of the State of North Carolina); the other three structures were privately owned. Unco's property, a lot fronting 39 feet on the north side of Courthouse Lane across from the Courthouse and having a depth of 85 feet, contained a small frame house which had been converted in 1957 into an office building which was leased to and occupied by respondent Sam B. Underwood as his law office.

Prior to adoption of the amended plan, the Redevelopment Commission and Pitt County entered into an agreement dated 24 September 1965 whereby, among other things, the Redevelopment Commission agreed to convey, if acquired, Parcel 13 to the County. This agreement was subsequently incorporated into a second agreement dated 16 February 1967 between the Commission, the City of Greenville, and the County, whereby the Commission agreed to acquire and clear all of Parcel 13 and to resell the same to Pitt County, and the County agreed to use the property in accordance with plans and specifications conforming with the urban renewal plan for centralizing the County offices and for parking.

After an unsuccessful effort to purchase the Unco property, the Redevelopment Commission commenced the present proceeding on 31 July 1969 by filing a petition for condemnation directed solely to the Unco property. (The Commission subsequently acquired by purchase and conveyed to the County all other properties in Parcel 13.) Respondents filed answer in which they denied the Redevelopment Commission's right to obtain the property by eminent domain, alleging that the inclusion of the Unco property in the 1966 amendment to the urban renewal plan was unconstitutionally arbitrary and capricious, and that, by virtue of the 1965 and 1967 agreements between the Commission and Pitt County, the County was attempting to exercise indirectly a legislatively unauthorized power of eminent domain.

The Clerk appointed Commissioners, who valued the Unco property at \$39,600.00, and by order dated 8 April 1971 the Clerk confirmed the Commissioners' award. Upon appeal to the Superior Court, the matter was heard de novo by the Judge upon stipulations entered into by the parties and upon evidence presented. Among other matters, the parties stipulated that the

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fair market value of the Unco property was \$39,600.00, which sum the Redevelopment Commission paid into court, and it was further stipulated that the Commission had adequate funds on hand to complete the Shore Drive Redevelopment Project. Following the hearing, the Judge entered judgment making findings of fact, conclusions of law, and adjudging that the Redevelopment Commission was entitled to acquire and did acquire title to the Unco property by eminent domain and awarding respondents \$39,600.00 with interest from the date of taking. Respondents Unco, Incorporated, and Sam B. Underwood and wife, appealed.

Harrell & Mattox by Fred T. Mattox for petitioner appellee.

Sam B. Underwood, Jr., for respondent appellant Unco, Incorporated.

Everett & Cheatham by C. W. Everett for respondent appellants, Sam B. Underwood, Jr., and wife.

PARKER, Judge.

At the outset we note that the Urban Redevelopment Law, which formerly appeared as Subchapter VII of Chapter 160 of the General Statutes, was transferred by Sec. 75 of Chap. 426 of the 1973 Session Laws effective 10 May 1973 to G.S. Chap. 160A and now appears therein as a new Article 22, and is re-numbered G.S. 160A-500 to 527. In order to conform with the citations in the judgment appealed from and the briefs, statutory references in this opinion will be made to the old section numbers.

[1] Appellants first contend that because three of the six structures and more than one-half of the land area in Parcel 13 were already in public ownership, there was no statutory authority under the Urban Redevelopment Law for the present proceeding. However, G.S. 160-465, the section of the Urban Redevelopment Law which deals specifically with eminent domain proceedings, contains the following:

"If any of the real property in the redevelopment area which is to be acquired has, prior to such acquisition, been devoted to another public use, it may, nevertheless, be acquired by condemnation; provided, that no real property belonging to any municipality or county or to the State, may be acquired without its consent."

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In view of this express statutory recognition that publicly owned property may be acquired by condemnation in furtherance of an urban renewal project when the owning public body gives its consent, appellants' first contention is overruled.

[2] Appellants next contend that the trial court erred in finding as a fact that the Redevelopment Commission and the City Council of the City of Greenville did not act arbitrarily or capriciously in adopting and approving the plan of redevelopment or the amendment to include Parcel 13. In support of this contention, appellants have assembled in their brief from the mass of testimony and exhibits included in this case's voluminous record the evidence relating to a series of discussions and transactions between 1962 and 1971 among various Redevelopment Commission, County, City, and Federal representatives which appellants argue demonstrates that Parcel 13 was incorporated into the redevelopment project without due consideration of the valid objectives of urban renewal. In answer to this contention, we first touch upon three statutory and factual aspects of this case.

First, we note that the Redevelopment Commission had express statutory power "[t]o cooperate with any government or municipality . . .," G.S. 160-462(2), and "[t]o act as agent of the State or federal government or any of its instrumentalities or agencies for the public purposes set out in this Article." G.S. 160-462(3). Furthermore, G.S. 160-464(e) (3) expressly provides:

"In carrying out a redevelopment project, the commission may:

* * * * *

"(3) With or without consideration and at private sale convey to the municipality, county or other appropriate public body such real property as, in accordance with the redevelopment plan, is to be used for parks, schools, public buildings, facilities or other public purposes."

Second, the record amply indicates that the elaborate procedure detailed by G.S. 160-463 whereby an urban redevelopment plan is formulated, reviewed, and approved, was carefully adhered to in this case both when the Redevelopment Plan here involved was originally approved and when it was modified as authorized by G.S. 160-463(k).

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Third, there was sufficient evidence in the record to sustain the trial court's essential findings of fact which support its conclusion that on 28 December 1966 Parcel 13 was "a blighted area within the meaning of G.S. 160-454, et seq." Although there was evidence that the Unco property was in good condition and the court did not find otherwise, ever since the amendment effected by Sec. 2 of Chap. 502 of the 1957 Session Laws, a property which is itself in good condition may still be subject to the power of eminent domain for urban renewal purposes if it is within an area in which the planning commission determines that "at least two thirds of the number of buildings within the area" are of the character described in the statute defining a "blighted area." As pointed out in Annot., 44 A.L.R. 2d 1414 at p. 1439, quoted in *Redevelopment Comm. v. Grimes*, 277 N.C. 634, 640-41, 178 S.E. 2d 345, 349 (1971):

"It has been repeatedly held or stated that the fact that some of the lands in an area to be redeveloped under redevelopment laws are vacant lands or contain structures in themselves inoffensive or innocuous does not invalidate the taking of the property, or invalidate the statute so permitting, according to the form of the contention in the particular case, usually on the ground that the action was justified as a necessary concomitant of area, as compared to structure-by-structure, rehabilitation."

Viewing the record in the present case against the foregoing statutory framework, we find no error in the trial court's finding that the Redevelopment Commission and the City Council did not act arbitrarily or capriciously in this case. Respondents' contention that the City, the Redevelopment Commission, and Pitt County somehow wrongfully cooperated to use the processes of urban renewal to accomplish a result primarily of benefit to the County and which it could not have otherwise achieved, is simply beside the point, where the applicable statutes not only authorize but direct such cooperation and where, as here, the record discloses that the stated purposes of urban renewal were at the same time being also accomplished.

[3] Respondents' next contention, that the trial court erred in denying their motion for involuntary dismissal made under Rule 41(b) at the close of petitioner's evidence, is not properly before us for review. After their motion was denied, respondents, as they had a right to do, elected to introduce evidence. By so doing, they waived the right to have reviewed on appeal

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the question whether their motion made at the close of petitioner's evidence was erroneously denied. 5 Moore's Federal Practice, ¶ 41.13[1], p. 1149. "The significance of this is that on appeal from a final judgment the court will look to all of the evidence and not merely that put in as part of the plaintiff's case." Wright and Miller, Federal Practice and Procedure, § 2371, p. 221. See *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973).

[4] Appellants' next contention is that "[t]he trial court erred in the exclusion and admission of certain evidence during the course of the trial." This is based on assignments of error III and IV, which are as follows:

"III. The actions of the Court, as set out in EXCEPTIONS 9 (R p 150), 9a (R p), 10 (R p 161-2), and 11 (R p 170) in allowing certain testimony and excluding other testimony.

"IV. The actions of the Court, as set out in EXCEPTIONS 11a (R p 205), 12 (R p 211), 13 (R p 212) and 14 (R p 213), in excluding certain testimony of H. R. Gray, County Manager of Pitt County (and County Auditor of Pitt County during some of the dates in question)."

Neither of these assignments shows specifically what question is intended to be presented for consideration by this Court without the necessity of going beyond the assignment of error itself. Therefore, these assignments of error do not conform to the requirements of the Rules of Practice of this Court or of our Supreme Court. *In re Will of Adams*, 268 N.C. 565, 151 S.E. 2d 59 (1966); *Lancaster v. Smith*, 13 N.C. App. 129, 185 S.E. 2d 319 (1971). Accordingly, assignments of error III and IV are ineffectual to bring up for appellant review any of the trial court's rulings admitting or excluding evidence.

We have carefully reviewed appellants' remaining contentions, that the trial court erred in its findings of fact and in failing to grant respondents' motion for dismissal and for judgment in their favor made at the close of all of the evidence, and find them without merit. There was evidence to support the trial court's crucial findings of fact and these in turn support the conclusions of law and the judgment rendered. In this connection we call attention to the following language, relative to the limited role of judicial review in cases such as this, from the Annotation in 44 A.L.R. 2d 1414, which was quoted with

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approval in the opinion in *Redevelopment Comm. v. Grimes*, *supra* at 640:

"In determining whether a particular area may legally be selected for redevelopment, either under the terms of the statute, or in terms of the requirement that the particular project serve a 'public use,' the role of judicial review is severally limited by the rule that the finding of the redevelopment authority, or similar administrative agency, that a particular area is 'blighted,' that redevelopment serves a 'public use,' or the like, is not generally reviewable, unless fraudulent or capricious, or, in some instances, unless the evidence against the finding is overwhelming."

As above noted, the trial court expressly found that the Redevelopment Commission and the City Council of the City of Greenville did not act arbitrarily or capriciously in this case, and the record supports that finding.

The judgment appealed from is

Affirmed.

Judges BRITT and BAILEY concur.

RALPH W. DAVIS v. VINTAGE ENTERPRISES, INC. AND RALPH W. DAVIS v. COLONIAL MOBILE HOMES, INC.

Nos. 7423DC741 and 7423DC819

(Filed 20 November 1974)

1. Rules of Civil Procedure § 52—trial without jury—duty of judge to find facts and state conclusions

When the judge tries a case without a jury he must find the facts specially and state separately his conclusions of law and thereby determine the issues raised by the pleadings and the evidence. G.S. 1A-1, Rule 52.

2. Uniform Commercial Code §§ 11, 15—merchant as to mobile homes—implied warranty of merchantability

Defendant was a merchant with respect to the sale of mobile homes, and the contract of sale executed by defendant contained no language, as permitted by G.S. 25-2-316, excluding or modifying the implied warranty of merchantability; therefore, the sale which is the

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subject of this action carried with it an implied warranty that the mobile home was fit for the purpose for which such goods are ordinarily used, i.e., residential purposes. G.S. 25-2-314(1), (2).

3. Uniform Commercial Code § 19— delivery of mobile home — inspection after trailer set up

Though there is no implied warranty when the buyer, before entering into the contract, examines the goods as fully as he desires and has knowledge equal to that of the seller, that principle was not applicable in this case since the contract of sale imposed upon the seller the obligation to deliver the mobile home and to set it up on plaintiff's lot, and fitness or unfitness for use as a home could not be ascertained by the buyer's examination and inspection until the trailer was set up; moreover, plaintiff was entitled to a reasonable time after delivery to inspect the trailer and reject it, and plaintiff's full payment in cash at the time of purchase would not impair his right to inspect following delivery. G.S. 25-2-513(1); G.S. 25-2-512(2).

4. Uniform Commercial Code § 20— acceptance — definition

Acceptance is ordinarily signified, after a reasonable time to inspect the goods, by language or conduct of the buyer that the goods conform and that he will take them or that he will retain them despite the fact that they do not conform; or acceptance may also occur by failure of the buyer to make an effective rejection after a reasonable opportunity to inspect. G.S. 25-2-606(1) (a) and (b).

5. Uniform Commercial Code § 20— effective rejection — requisites

Effective rejection means (1) rejection within a reasonable time after delivery or tender and (2) seasonable notice to the seller. G.S. 25-2-602.

6. Uniform Commercial Code § 20— acceptance with knowledge of nonconformity — revocation of acceptance

The buyer may revoke his acceptance made with knowledge of a nonconformity if (1) the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured and (2) the nonconformity substantially impairs the value of the goods.

7. Uniform Commercial Code § 21— revocation of acceptance — damages for breach of warranty — election by buyer not required

A buyer who revokes his acceptance is not required to elect between revocation of acceptance on the one hand and recovery of damages for breach of implied warranty of fitness on the other; rather, both remedies are available to him. G.S. 25-2-608.

8. Uniform Commercial Code § 20— sale of mobile home — rejection by buyer — breach of warranty by seller

The breach of contract action is remanded for a determination as to whether plaintiff seasonably rejected the mobile home in question and notified defendant of such rejection, or upon a finding that plaintiff did not reject and did not revoke his acceptance, whether defendant breached its implied warranty of fitness.

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APPEAL by plaintiff and defendant from *Osborne, Judge*, 14 May 1974 Session of District Court held in ALLEGHANY County. Heard in the Court of Appeals on 16 October 1974.

This is a civil action wherein plaintiff, Ralph W. Davis, seeks to recover damages from the defendant, Colonial Mobile Homes, Inc., a subsidiary of Vintage Enterprises, Inc., for an alleged breach of contract for the sale of a mobile home.

Separate but substantially identical records were filed in this court by the plaintiff and the defendant. At the trial before the judge without a jury the parties offered evidence tending to show the following:

On 18 May 1973 plaintiff purchased a mobile home from the defendant. He paid cash for the mobile home and signed a contract providing for the defendant to deliver the trailer to plaintiff's lot near Sparta, N. C., and set it upon blocks. The defendant delivered the mobile home on 7 June 1973. Although the plaintiff had furnished sufficient blocks to level the trailer, the defendant did not completely level the mobile home until 12 June 1973. When the defendant transported the mobile home from Yadkinville to the plaintiff's lot, the right rear tire on the mobile home was flat. The defendant's driver stated, "We pulled it up the mountain that way." When plaintiff's neighbor, who was present at the time the mobile home was delivered, said, "You had a little bump up, didn't you?" and asked what was wrong with the top of the trailer, the driver replied, "We had a little bump up." Plaintiff made several calls to Mr. Joey Odell, district manager for defendant, but was unable to obtain keys for the trailer until three weeks after it had been delivered.

When plaintiff was finally able to get inside the trailer he

" . . . found that the cabinets were out of line, the door to the refrigerator was out of line and would not make a tight seal, and the outer edge of the door of the refrigerator was about a quarter-inch higher than the top of the refrigerator. The windows would not shut a tight seal, and the front door would not stay shut. When you would shut the front door, the walls would vibrate just like the studding had been torn completely loose from the rafters. Along the upper edge and the right rear corner of the outside of the mobile home, you could stick your fist up between the panelling [sic] and the frame of the trailer. On the bottom at the right rear corner, the metal exterior was bent out

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of shape and pulled away from the frame. There was an indentation less than $\frac{1}{4}$ inch deep in the left front corner of the frame and the 'I' beam running under the chassis was completely warped. The 'I' beam on the left-hand side was twisted and bent and bowed out. The windows wouldn't shut, the floors were buckled, and the rafters on the top were warped and bent out of shape; they were warped into a kindly 'S' shape."

Plaintiff further testified that "[w]hen it rained the floors . . . flooded. Water ran out from under the panelling [sic] into the inside. My daughter packed towels and stuff under the panelling [sic] to keep water out of the shoes. After about an hour, the circuit breakers in the electrical panels started flickering off, so I pulled the main switch. There was water all over the floors, in the hall and kitchen, bathroom and both bedrooms. After each rain, water would drain from the walls for from one to three hours—from between the outer aluminum skin and the inner walls."

Although the plaintiff did not want to move into the mobile home after he inspected it, he had already given his landlord a thirty-day notice of his intention to move and could not find any other place to live. He made numerous calls to the defendant about the condition of the trailer, but the defendant would not respond or return any of his calls. An employee of the defendant did, however, go to the plaintiff's trailer on several occasions; but he did not make any substantial repairs. Finally, plaintiff complained to the Consumer Protection Division of the Attorney General's Office. Soon thereafter he contacted an attorney. On 3 July 1973 the plaintiff's attorney wrote a letter to the defendant wherein he stated that the mobile home was "badly damaged and unfit for use or occupancy . . . [and] was literally shaken to pieces and damaged beyond use or repair" because it had been pulled to plaintiff's property on a flat tire. He "demand[ed] immediate replacement of said mobile home; or, in the alternative, a refund of all money paid to your company . . . [and] tendered a return of said mobile home." On 29 July 1973 five or six employees of the defendant inspected plaintiff's trailer. When one of the servicemen began to make repairs, however, the plaintiff refused to have any work performed on the mobile home. The plaintiff moved out of the trailer about the third week of September 1973, and the trailer has been unoccupied since that time. On 28 February 1974 a high wind blew the trailer off its blocks.

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The trial judge made findings and conclusions which, except where quoted, are summarized as follows:

The plaintiff purchased a mobile home from the defendant for \$5,359.90. The home was delivered to the plaintiff's lot but was not properly set up as provided in the sales contract. At the time of delivery the mobile home had some small dents on its exterior, a defective water heater which was replaced by the defendant, a number of doors and windows that would not operate properly, a slightly warped frame, a slight crack in the tile across the kitchen floor, and a flat tire. The defendant failed to deliver keys to the plaintiff for about two weeks after delivery of the trailer, and the plaintiff lived in the mobile home for about ninety days. During the time plaintiff lived in the mobile home, the trailer developed a number of leaks. One such leak caused the circuit breaker to short out and cut off the electricity to the trailer. On 29 July 1973 the plaintiff refused to allow the defendant's workmen to make repairs and adjustments to the mobile home. The defendant, on four previous occasions, had sent an employee to repair the mobile home. The plaintiff moved out of the trailer and since that time it has been blown onto the ground by a high wind.

The court concluded that the "plaintiff . . . [had] suffered a loss of in the fair market value of his said mobile home of \$900.00, as a result of defects apparent on delivery or shortly thereafter, which said defects were not present or apparent at the time plaintiff purchased said mobile home at defendant's place of business at Yadkinville, North Carolina." It further concluded that the [d]efendant . . . [had] breached its express and implied contract to deliver said mobile home to the plaintiff in a new condition and without substantial defects, and [that the] plaintiff [had] been damaged on account thereof in the sum of \$900.00."

From a judgment entered in favor of the plaintiff for \$900.00, both parties appealed.

Edmund I. Adams for plaintiff appellant.

Arnold L. Young for defendant appellant.

HEDRICK, Judge.

[1] When the judge tries a case without a jury, he must find the facts specially and state separately his conclusions of law

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and thereby determine the issues raised by the pleadings and the evidence. G.S. 1A-1, Rule 52, Rules of Civil Procedure. When this is done, the appellate court can review the case to determine whether there is competent evidence in the record to support the facts found and whether the judge correctly applied to those facts the appropriate legal principles. Suffice it to say, the findings and conclusions made by the trial judge in this case do not properly determine the issues raised by the pleadings and the evidence. In his complaint the plaintiff alleged the following:

"Plaintiff's damages have been caused solely and exclusively by defendant's breach of its said contract with plaintiff, defendant's actions in negligently damaging said mobile home, and defendant's breach of warranty. Plaintiff has tendered the return of said mobile home to defendant and demanded damages and immediate repayment of all funds paid by plaintiff to defendant, but defendant has failed and refused to do so."

The allegations in the complaint and the evidence require consideration of the Uniform Commercial Code. See *Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E. 2d 161 (1972).

[2] The ordinary purpose for which a mobile home is used is residential. Here, the mobile home was sold and purchased for that purpose. "Unless excluded or modified (§ 25-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind (2) Goods to be merchantable must be at least such as . . . (c) are fit for the ordinary purposes for which such goods are used" G.S. 25-2-314(1), (2). Defendant is a merchant with respect to the sale of mobile homes, and the contract of sale executed by defendant contains no language, as permitted by G.S. 25-2-316, excluding or modifying the implied warranty of merchantability. Hence, the sale under discussion carried with it an implied warranty that the mobile home was fit for the purpose for which such goods are ordinarily used, i.e., residential purposes.

[3] While there is no implied warranty when the buyer, before entering into the contract, examines the goods as fully as he desires, G.S. 25-2-316(3) (b), and has knowledge equal to that of the seller, *Driver v. Snow*, 245 N.C. 223, 95 S.E. 2d 519 (1956), this principle is not applicable to the facts here because

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the contract of sale imposed on the seller the obligation to deliver the mobile home and set it up on plaintiff's lot. Until that was properly done, fitness or unfitness for use as a home could not be ascertained by the buyer's examination and inspection of the goods on the seller's premises. Unless otherwise agreed, "[w]hen the seller is required . . . to send the goods to the buyer, the inspection may be after their arrival," G.S. 25-2-513(1); and the buyer is entitled to a reasonable time after the goods arrive at their destination in which to inspect them and to reject them if they do not comply with the contract. *Parker v. Fenwick*, 138 N.C. 209, 50 S.E. 627 (1905). Moreover, plaintiff's cash payment would not impair his right to inspect following delivery. G.S. 25-2-512(2). Here, delivery was not accomplished until defendant set up the mobile home on plaintiff's lot.

What remedies are available to defendant for breach of implied warranty of fitness? The answer to this question turns on whether defendant *accepted* the mobile home. This requires consideration of the Uniform Commercial Code's concept of rejection, acceptance, and revocation of acceptance.

[4-7] Acceptance is ordinarily signified, after a reasonable time to inspect the goods, by language or conduct of the buyer that the goods conform and that he will take them or that he will retain them despite the fact that they do not conform. G.S. 25-2-606(1)(a). Acceptance may also occur by failure of the buyer "to make an effective rejection" after a reasonable opportunity to inspect. G.S. 25-2-606(1)(b). Effective rejection means (1) rejection within a reasonable time after delivery or tender and (2) seasonable notice to the seller. G.S. 25-2-602. Acceptance precludes rejection of the goods accepted and, if made with knowledge of a nonconformity, cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. G.S. 25-2-607(2). Thus, the buyer may *revoke his acceptance* if (1) "the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured," G.S. 25-2-607(2), and (2) the nonconformity substantially impairs the value of the goods. G.S. 25-2-608(1). Revocation of acceptance must be made within a reasonable time after the buyer discovers, or should have discovered, the ground for it, *Hajoca Corp. v. Brooks*, 249 N.C. 10, 105 S.E. 2d 123 (1958), and it is not effective until the buyer notifies the seller of it. G.S. 25-2-608(2). A buyer who

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so revokes his acceptance is no longer required to elect between revocation of acceptance on the one hand and recovery of damages for breach of implied warranty of fitness on the other. Both remedies are now available to him. G.S. 25-2-608.

[8] The pleadings and the evidence in this case raise an issue as to whether the plaintiff seasonably rejected the mobile home and notified the defendant of such rejection. While the plaintiff did not allege that he revoked his acceptance of the mobile home, the evidence raises this issue also; and, if the court should conclude that the plaintiff did not reject the goods, it then should consider whether the plaintiff justifiably revoked his acceptance. Evidence of the condition of the trailer at the time it was delivered to plaintiff's lot, failure of the defendant to deliver the keys for three (3) weeks so that plaintiff could inspect the trailer, the letter written by plaintiff's attorney to the defendant, the plaintiff's occupancy of the trailer for approximately ten (10) weeks with or without knowledge of the defects, defendant's failure to make timely repairs, plaintiff's refusal to let defendant make repairs, and plaintiff's abandonment—are some of the circumstances to be considered in determining whether plaintiff seasonably rejected the trailer or justifiably revoked his acceptance thereof.

If plaintiff (1) made an effective rejection of the mobile home or (2) justifiably revoked his acceptance of it, he has a right to recover "so much of the price as has been paid" plus any incidental and consequential damages he is able to prove. G.S. 25-2-711(1); G.S. 25-2-715; *Motors, Inc. v. Allen, supra*. If the court should conclude that the plaintiff did not reject and did not revoke his acceptance, it then would be necessary for the court to consider the final issue raised by the pleadings and the evidence, i.e., whether the defendant breached its implied warranty of fitness. The measure of damages in that event is "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show damages of a different amount," G.S. 25-2-714(2), plus incidental damages and such consequential damages as were within the contemplation of the parties. G.S. 25-2-715; *Motors, Inc. v. Allen, supra*; *Hendrix v. Motors, Inc.*, 241 N.C. 644, 86 S.E. 2d 448 (1955); *Harris v. Canady*, 236 N.C. 613, 73 S.E. 2d 559 (1952).

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The parties may be permitted to amend their pleadings, if they so desire, to conform them to the evidence. G.S. 1A-1, Rule 15, Rules of Civil Procedure.

Therefore, the judgment entered is vacated, and the cause is remanded to the district court for a new trial in accordance with this opinion.

Vacated and remanded.

Judges MORRIS and BAILEY concur.

MARIE PONDER CLARK v. PATRICIA PROFFITT CLARK, AND
CECIL CLARK, GUARDIAN OF GENE WAYNE CLARK, JOHN
LLOYD CLARK, GAMBELL CLARK, GILA CLARK

No. 7424DC747

(Filed 20 November 1974)

1. Divorce and Alimony § 24—child visitation privileges—consent to modification without showing change of condition

Where the parties to a consent custody order agreed to allow the trial court to modify defendant's visitation privileges without a showing of change of condition, they are bound by their agreement and the court properly modified defendant's visitation privileges without such a finding.

2. Appeal and Error § 49—failure of record to show excluded evidence

An exception to the exclusion of evidence will not be considered when the record fails to show what the excluded evidence would have been.

APPEAL by plaintiff from *Braswell, Judge*, 1 April 1974 Session of District Court held in MADISON County. Heard in the Court of Appeals 16 October 1974.

Plaintiff seeks review of an order entered 10 April 1974 modifying certain provisions of a consent custody judgment which had been entered into by the parties and their counsel in open court at a previous trial on 11 August 1972. This case initially arose upon the complaint of the plaintiff filed 3 May 1972 seeking award of custody of the plaintiff's four grandchildren. On that date, upon motion of the plaintiff, an order was entered granting immediate temporary custody of the children to the plaintiff and an order secured prohibiting re-

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moval of the children from North Carolina to the State of Alabama by their mother, Patricia Proffitt Clark, the defendant. This order was continued in effect by consent until the date of the trial and until entry of the 11 August 1972 consent judgment.

The consent judgment contains extensive findings of fact based upon evidence produced at the hearing and the admissions of the parties. These findings establish that the defendant abandoned her husband and children on 15 August 1967; that she thereafter granted to her husband the custody of the children by deed of separation; that following her husband's death in 1969 defendant permitted the children to remain in the sole care and keeping of the plaintiff, their grandmother; that during the years 1969, 1970, 1971 and 1972, the children resided continuously with the plaintiff who provided "for their care and keeping, their discipline, their education, their development and their supervision . . . and . . . assumed custodial responsibilities for said children and stood in loco parentis to them; . . ." until the date of the entry of the consent judgment. The findings further establish that during this period of four years the defendant seldom visited or telephoned her children and never corresponded with them or with the plaintiff concerning them. The judgment also finds that by this course of indifference and by "her course of misconduct, incident to her separation from her husband and her state of living in Buncombe County and in Jefferson County, Alabama, in particulars known to the parties and their counsel, disclosed to the court but by agreement not set forth in this order, she, the said defendant, did abandon her said children."

The consent judgment concludes that the plaintiff has properly cared for the children and was "the fit and proper person to have and be awarded their care and custody"; that the defendant mother was "not a fit and proper person to have the care and custody of said children"; that the place of abode of the defendant mother was "not a fit and proper place for the upbringing of the said infant children"; and that it was in the "best interests of the children that their care and custody be awarded to the plaintiff." Upon these findings and conclusions the consent judgment awarded the custody of the children to the plaintiff, made provisions for the defendant to visit with the children with transportation of the children to be provided by defendant's mother, and made provision for the

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posting of bond to guarantee that the children not be removed by the defendant from North Carolina to Birmingham, Alabama, the place of the defendant's residence.

The record shows that bond was posted and that the defendant thereafter visited her children regularly as specified in the judgment. No further hearings concerning the custody of the children were held until 3 October 1973, when the case came to trial on the defendant's motion for a change of custody. This motion asserted that on 9 December 1972 the defendant married David Fowler, the man with whom she previously had been living in Birmingham, Alabama, and accused the plaintiff of various acts designed to obstruct and interfere with defendant's visits with her children.

At the hearing on her motion, defendant testified that at the time of the trial on 11 August 1972 and the entry of the consent judgment, she was not married to David Fowler but that within two weeks after he obtained his divorce from his first wife they were married and are now living together as lawfully wedded husband and wife; that at the time of the trial and entry of the consent judgment she had limited income and assets but that since her marriage to David Fowler, she had secured a job from which she derives substantial earnings and that her husband had received several pay raises which had improved their economic condition and their ability to provide for the children; and finally that at the time of the trial she and David Fowler were living together in a two bedroom townhouse but were now living in a three bedroom apartment. Defendant also testified to difficulty in reaching her children by telephone on several occasions and expressed dissatisfaction with the clothing provided by the plaintiff to the children when they visited her on one or more weekends. She further testified to wanting the children to attend her wedding to David Fowler and to facts from which she concluded that the plaintiff was responsible for the children's failure to attend the wedding. Friends of the defendant from Birmingham, Alabama, testified that her general reputation was excellent and that her home always was neat and clean.

The plaintiff and the defendant, Cecil Clark, Guardian of the testamentary estate of the children each testified at length about the care and upbringing the children received from the plaintiff. Other witnesses were tendered by the plaintiff to establish her good reputation and to describe the care, love and attention which she had provided for the children from 1967

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until the date of the hearing. At the conclusion of the defendant's testimony and at the conclusion of all the evidence, plaintiff moved for a dismissal or for summary judgment in her favor. Both motions were denied. At this time a suggestion was made by the court that it might be helpful to have the services of a child psychologist. The court deferred rendering any judgment in the matter until the parties decided whether a psychological examination of the children would be desirable and court was "adjourned *sine die*" subject to having the matter "recalled upon notice as necessary."

On 15 February 1974 the defendant filed a motion for entry of order, and upon plaintiff's answer thereto and upon plaintiff's motion to reopen the matter for the presentation of additional evidence suggesting a change of conditions, a second proceeding was held on 4 March 1974. At this hearing the court refused to consider the psychiatric report of one Dr. John Patton, who had interviewed the children at the request of the plaintiff when the parties were unable to agree upon a psychiatrist or psychologist. The court also refused to permit Dr. Patton to be called to give testimony and noted plaintiff's exception, treating the tender of Dr. Patton's report as equivalent to tender of his testimony. Instead the four children were interviewed in open court.

Upon the basis of the testimony of the oldest child, Gene Wayne Clark, then nearly 14 years of age, the court found that he was "insistent in stating his intention to refuse to move from the home of his grandmother (plaintiff) and the community in which he has been reared." The court also noted that Gene Wayne Clark appeared to be "of unusual maturity for his years" and "that all of the children are very close in their love and affection for one another."

Based on these and other findings the court concluded as a matter of law that there had been "a substantial change in circumstances affecting the children" since the order awarding custody of the children to the plaintiff on 11 August 1972; that both plaintiff and defendant and her husband were fit and proper persons to serve as parent(s) to the children but that "a sudden permanent change of custody and place and community of residence for the children at this time could do violence and harm to their welfare and future development" and "that permanent separation of the children from each other at this time would not be in their best interests." It, therefore, was ordered that plaintiff would continue to have custody of the four chil-

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dren and that defendant would continue to have the privilege of having her children visit with her at the residence of her parents one weekend every month as per the consent judgment of 11 August 1972. In addition, it was ordered that the consent judgment be modified to the extent that the defendant would have "the privilege of visiting with her children and of having her children visit with her one, two, three or four of them at the same time, in or out of the presence of the children's paternal relatives and in or out of the State of North Carolina, as shall be mutually agreed upon between the parties, on such occasions, in such manner and for such periods of time as shall not interfere unreasonably with school attendance, health, emotional or moral well-being and development of the said children or any of them." It further was stated "[t]hat acts of omission or commission by either the plaintiff or the defendant with respect to any or all of the children which tend to interfere with the development or existence of a natural bond of affection among the children themselves, or between any of the children and their mother or their grandmother, shall constitute grounds for such modification of this order as shall, after hearing, appear in the best interests of the said children or any of them." Finally defendant was required to post a bond of \$7,500 to insure return of the children to the plaintiff following their visits with defendant and her husband in the State of Alabama.

Additional facts necessary for decision are set forth in the opinion.

Gudger and Sawyer, by Lamar Gudger, and Ronald W. Howell for plaintiff appellant.

Riddle and Shackelford, P.A., by John E. Shackelford, for defendant appellee.

MORRIS, Judge.

[1] Plaintiff's first assignment of error relates to the denial of her motions to dismiss at the conclusion of the defendant's evidence and at the conclusion of all the evidence. Plaintiff concedes that, notwithstanding the intentions of the parties to restrict subsequent modifications of the consent judgment the District Court had authority to change the custody provisions therein. *Thomas v. Thomas*, 259 N.C. 461, 130 S.E. 2d 871 (1963). Plaintiff maintains, however, that a judgment awarding custody cannot be modified or disturbed except upon evidence

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proving a "substantial change of circumstances." She contends that such a change has not been shown in this case and therefore her motions to dismiss should have been granted. After carefully reviewing the record, we find that plaintiff's motions were properly denied.

We recognize the well-established principle that a change in circumstances must be shown in order to modify an order relating to the custody of a minor child. G.S. 50-13.7; G.S. 50-16.9; *McDowell v. McDowell*, 13 N.C. App. 643, 186 S.E. 2d 621 (1972), and cases cited therein. In this case, however, we conclude that the defendant was not required to show a change in circumstances.

We note that no change in custody was made in this case. In fact the only effect of the order was to modify the visitation privileges of the defendant. In this regard we think Item 4 of the consent judgment of 11 August 1972 is especially pertinent. Item 4 provides as follows:

"4. This cause is retained for further orders and particularly for entry of special order further specifying the visiting privileges of the defendant, Patricia Proffitt Clark, which said special order only may be entered *without showing of change of condition* but any such special order shall be entered only after appropriate notice." (Emphasis supplied.)

Where the parties have specifically agreed to allow the trial judge to modify visitation privileges of a party without requiring a showing of change of condition, we are of the opinion, and so hold, that they are bound by their agreement. Thus, in this case, even assuming arguendo that defendant was unable to show a "substantial change in circumstances," plaintiff has no grounds for complaint.

[2] The only other question raised on appeal by the plaintiff is whether the trial judge erred in refusing to hear and consider evidence concerning the mental and physical condition of the children, including medical evidence not available on 3 October 1973, but discovered and offered at the 4 March 1974 hearing and prior to the entry of the order of modification. We note that the record does not include the evidence that was purportedly offered and refused. Since appellant did not incorporate the excluded evidence into the record and thus disclose the alleged error, this assignment of error will not be considered.

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"An exception to the exclusion of evidence will not be considered when the record fails to disclose what the excluded evidence would have been." *Barringer v. Weathington*, 11 N.C. App. 618, 621, 182 S.E. 2d 239 (1971).

For the foregoing reasons, the order of the trial judge is affirmed.

Affirmed.

Judges HEDRICK and BALEY concur.

CHAS. A. FISHER, EXECUTOR OF GEORGE M. MISENHEIMER, DECEASED,
PETITIONER AND J. CLAY QUERY AND WIFE, OLLIE M. QUERY,
MOVANTS v. CHAS. W. MISENHEIMER, ROSANNA MISEN-
HEIMER AND SARAH MISENHEIMER, RESPONDENTS AND GRACE
TAYLOR McRORIE, ELIZABETH TAYLOR BURGESS AND KEN-
NETH B. CRUSE, INTERVENORS

No. 7419SC751

(Filed 20 November 1974)

Contracts § 18—sale of devised property—failure to honor bid—abandonment of contract

Actions by child of testator who bid \$60 for a lot sold by executor to make assets with which to pay debts of the estate amounted to an abandonment of the contract between the child and the executor where the child (1) failed to pay the \$60 and demand a deed, (2) filed no exception to the executor's final account which stated that because of the child's failure to comply with his bid, the lots he bid on would continue to belong to the estate, and (3) accepted a warranty deed from his sister for her undivided one-half interest in and to the lot in question and subsequently executed a warranty deed to his sister for all his undivided one-half interest in and to the lot, since that exchange of deeds between the children indicated that they agreed with the statement in the final accounting that the lots which the child did not pay for continued to belong to the estate.

APPEAL by intervenors from *Exum*, Judge, 4 March 1974 Civil Session of Superior Court held in CABARRUS County.

This appeal involves another episode in extensive litigation over real estate devised in the will of George W. Misenheimer (testator) who died on 17 January 1907. The cases of *Taylor v. Honeycutt*, 240 N.C. 105, 81 S.E. 2d 203 (1954); *McRorie v. Creswell*, 273 N.C. 615, 160 S.E. 2d 681 (1968); and *McRorie*

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v. Shinn, 11 N.C. App. 475, 181 S.E. 2d 773, *cert. denied*, 279 N.C. 395, 183 S.E. 2d 242 (1971), involved the will and other aspects of the estate of said testator, as reported in each case. The land involved here is the northern half of the parcel referred to in the will as lot no. 1.

Here, intervenors, Grace Taylor McRorie (Mrs. McRorie) and Elizabeth Taylor Burgess (Mrs. Burgess), granddaughters of testator, and K. B. Cruse (Cruse) appeal from judgment affirming an order of the Clerk of the Superior Court of Cabarrus County, entered in a special proceeding instituted in 1907, appointing a commissioner to execute and deliver a deed for the subject property which was sold in said proceeding in 1907, upon the payment of the purchase price, plus interest. The following pertinent facts appear:

(1) In his will, testator devised the subject property, along with other real estate, to his widow, Sarah, and daughter, Rosanna, for "their life time"; should Rosanna have no "heirs" then the property would go to testator's son, C. W., his lifetime, and at his death to his heirs. (See 240 N.C. 105, 81 S.E. 2d 203 (1954), where the court adjudged in an action in which Rosanna was a party, that she received only a life estate under the will.) Charles A. Fisher was named executor of the will.

(2) On 26 June 1907, this special proceeding was instituted by Fisher, executor, against C. W., Rosanna and Sarah. The purpose of the proceeding was to sell the land involved here, together with other lands belonging to testator, to make assets with which to pay debts of the estate. An order of sale was entered by the clerk and Fisher was named commissioner to sell the lands.

(3) At a sale conducted by Fisher, C. W. became the last and highest bidder of lot no. 1 for \$60. Fisher reported the sale to C. W., along with other sales, to the court. On 14 September 1907, the clerk entered an order confirming the sales and authorizing and directing Fisher to execute deeds to the purchasers upon payment of the purchase prices.

(4) In June of 1908, Fisher instituted a special proceeding to sell another tract of land left by the testator for purpose of making assets with which to pay debts of the estate and costs of administration.

(5) In August of 1908, Fisher filed his final accounting as executor of the estate. Under receipts he reported various sums

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received from sale of four parcels of land to persons other than C. W. As to C. W., and under "receipts," Fisher made the following entry: "2 Lots bid off by C W Misenheimer, never paid for and still belongs to the estate. (No amount received.)" Deeds for the other lands sold were executed by Fisher to the respective purchasers, and recorded, but no deed was made by Fisher to C. W. or anyone else for lot no. 1.

(6) The validity of the two special proceedings was upheld in an opinion by this court reported in 11 N.C. App. 475, 181 S.E. 2d 773, *cert. denied*, 279 N.C. 395, 183 S.E. 2d 242 (1971).

(7) Sarah died in 1918 or 1919. Rosanna was married to George Taylor in April of 1914 and he predeceased her. Rosanna was survived by two children, Mrs. Burgess and Mrs. McRorie, who were born in 1917 and 1920 respectively.

(8) On 21 November 1924, Rosanna and her husband, by warranty deed, conveyed "[a]ll their undivided one-half interest in and to" lot no. 1 to C. W. In February of 1925, C. W. and wife, by warranty deed, conveyed "[a]ll his undivided one half interest in and to" lot no. 1 to Rosanna. The deeds were duly recorded soon after their execution.

(9) As of 28 March 1936, by mesne conveyances, including deeds from Rosanna and husband and C. W. and wife, Harry A. Martin had acquired title to lot no. 1. On 12 March 1947, Martin and wife executed a warranty deed to movants Query purporting to convey the land involved in this appeal, the same being the northern half of lot no. 1, containing approximately six-tenths of an acre.

(10) On 31 March 1954, and 5 April 1954, Mrs. Burgess, Mrs. McRorie and their husbands executed deeds to Cruse quit-claiming and remising to him one-half interest in certain lands formerly belonging to testator, including the lands involved here.

(11) Rosanna died on 26 December 1965; C. W. and Fisher are also deceased.

(12) C. W. and Rosanna, and those claiming title to the subject property including movants Query, have had continuous and uninterrupted possession of the subject property since June of 1907.

(13) On 10 June 1968, Mrs. McRorie, her husband, and Mrs. Burgess instituted an action against the Querys, movants

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herein, asking for a declaration of their title to, and possession of, the subject property. The Querys filed answer and cross action, pleading numerous defenses, and asking that Cruse be made a party defendant; Martin and wife, grantors in the warranty deed to the Querys, asked to be made parties defendant. Additional parties were made as requested.

(14) On 18 November 1971, the Querys filed a motion in the 1907 special proceeding asking that an executor, c.t.a., d.b.n., and commissioner be appointed by the court to complete the administration of testator's estate and this proceeding, and that the person so appointed be directed to execute a deed to the Querys for the subject property. On the next day, pursuant to Rule 68, the Querys filed a tender of payment of the \$60 purchase price, plus interest. Mrs. McRorie, Mrs. Burgess and Cruse were allowed to intervene and file answer to the motion.

(15) On 20 April 1972, following a hearing, the clerk entered an order finding facts and making conclusions of law substantially as follows: This special proceeding is still pending in contemplation of law; upon receipt of the bid price after the judicial confirmation, C. W. or his assigns "... was entitled to a deed conveying title as of the date of the sale ..."; movants Query, as assignees of C. W. and Rosanna, are entitled to the relief to which C. W. and Rosanna would be entitled if living; upon appointment of a commissioner and conveyance of the subject property to movants Query, this proceeding will be consummated and the administration of the estate of testator will have been completed. The clerk appointed a commissioner with directions to execute and deliver to the Querys a deed for the subject property. Intervenors appealed from the order of the clerk.

(16) Thereafter, this cause, together with the action filed on 10 June 1968, came on for hearing before Judge Exum upon appeal from the clerk's order and on motions of various parties for summary judgment. Following a hearing, Judge Exum entered judgment making findings of fact and conclusions of law in favor of the Querys and ratifying and affirming the order of the clerk. He also adjudged that his decision in this cause was determinative of the rights of the parties in the June 1968 action and dismissed it.

The two causes were argued and considered together in this court but separate opinions are being filed. Further pertinent facts appear in the opinion.

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Hartsell, Hartsell & Mills, P.A., by William L. Mills, Jr., and Williams, Willeford, Boger & Grady, by John Hugh Williams, for movants appellees.

Cole & Chesson, by James L. Cole, for intervenor appellants.

BRITT, Judge.

Did the court err in entering the judgment ratifying and affirming the order of the clerk appointing a commissioner to consummate a judicial sale made in 1907 upon the payment of bid made at the sale, plus interest? We hold that it did.

No party to this cause has cited, and our research has not disclosed, a precedent that controls this case. Applying well defined legal principles to the facts, however, leads us to conclude that when C. W. became the last and highest bidder for lot no. 1, a contract was created between him and Fisher, acting as commissioner of the court. The contract was subject to a confirmation by the court, and when the sale was confirmed, the contract became binding on C. W. and on Fisher. While Fisher was entitled to proceed with legal action to compel C. W. to comply with his bid, Fisher did not pursue that course but treated C. W.'s failure to comply as an abandonment of the contract by C. W. In all probability, Fisher concluded that payment of the debts of the estate required considerably more than the \$60 bid by C. W., therefore, he instituted the second special proceeding to sell the 38-acre tract, which brought \$750. Thus the question arises, did C. W. abandon his contract with Fisher?

In *May v. Getty*, 140 N.C. 310, 316, 53 S.E. 75 (1905), we find:

It is now well settled that parties to a written contract may, by parol, rescind or by matter *in pais* abandon the same. *Faw v. Whittington*, 72 N.C., [sic] 321; *Taylor v. Taylor*, 112 N.C., [sic] 27; *Holden v. Purefoy*, 108 N.C., [sic] 163; *Riley v. Jordan*, 75 N.C., [sic] 180; *Gorrell v. Alsbaugh*, 120 N.C., [sic] 362. In the case first cited, BYNUM, J., for the Court, says: "The contract is considered to have remained in force until it was rescinded by mutual consent, or until the plaintiffs did some acts inconsistent with the duty imposed upon them by the contract which amounted to an abandonment." *Dula v. Cowles*, 52 N.C., [sic] 290; *Francis v. Love*, 56 N.C., [sic] 321. What will amount to an abandonment of a contract is of course a question of law

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and the acts and conduct which are relied on to constitute the abandonment should be clearly proved, and they must be positive, unequivocal, and inconsistent with the existence of a contract, but when thus established they will bar the right to specific performance. *Miller v. Pierce*, 104 N.C., [sic] 390; *Faw v. Whittington*, *supra*; *Holden v. Purefoy*, *supra*. . . .

Appellees cite *Wood v. Fauth*, 225 N.C. 398, 35 S.E. 2d 178 (1945). In that case, the court held that the report of sale in a partition proceeding, duly confirmed, confers upon the bidder certain rights of which the bidder cannot be summarily deprived; and upon the facts appearing in that case the bidder, upon a motion to show cause, should have been allowed a reasonable time within which to comply before the court vacated the sale and ordered a resale. We think *Wood* is distinguishable from the case at bar, primarily by reason of the time element. In *Wood*, approximately three years passed between the date of the sale and the order purporting to set it aside and ordering a resale. Even then, the court stated that “[u]nder the circumstances of this case we think the court below was in error in vacating the previous order of confirmation and ordering resale without affording defendant reasonable time as prayed within which to pay the full amount of her bid in cash. . . .” *Wood*, *supra* at 399-400.

In the portion of the *May* opinion quoted above, the court alluded to a contract remaining in force until rescinded by mutual consent or until one of the parties did something inconsistent with the duty imposed by the contract which amounted to an abandonment. Certainly, the sum total of the things that C. W. did, or did not do, amounted to an abandonment of his contract to purchase lot no. 1 for \$60. In the first place, he failed to pay the \$60 and demand a deed. Next, he evidently filed no exception to Fisher's final account which stated that because of C. W.'s failure to comply with his bid, the lots he bid on would continue to belong to the estate. Finally, his acceptance of a warranty deed from Rosanna in 1924 for her “. . . undivided one-half interest in and to” lot no. 1, and his execution in 1925 of a warranty deed to Rosanna for “[a]ll his undivided one half interest in and to” lot no. 1, were acts inconsistent with the duty imposed upon him by the contract with Fisher and tended to show an abandonment of the contract. In fact, the exchange of deeds between C. W. and Rosanna indicated

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that they agreed with the statement in the final accounting that the lots which C. W. did not pay for continued to belong to "the estate" and that as the two children of testator, they considered themselves to be "the estate" and, however erroneously, the fee simple owners of the property.

Movants Query have no greater right to consummate the 1907 sale than C. W. would have if he were living. The conclusions of law on which the trial court based its judgment included conclusions that lot no. 1 has been *in custodia legis* since the date of the order of confirmation of sale, that said confirmation by the court conferred upon C. W. certain legal rights in and to the subject property "of which neither he nor his assignees have been divested," and that movants Query, as assignees of C. W., have succeeded to all of the rights, title and interest of C. W. in this proceeding and in and to the subject real estate. We reject those conclusions.

For the reasons stated, the judgment appealed from is
Reversed.

Judges CAMPBELL and VAUGHN concur.

GRACE TAYLOR McRORIE AND HUSBAND, HOWARD S. McRORIE AND ELIZABETH TAYLOR BURGESS, WIDOW, PLAINTIFFS AND KENNETH B. CRUSE, ADDITIONAL PLAINTIFF V. J. CLAY QUERY AND WIFE, OLLIE M. QUERY, DEFENDANTS AND HARRY A. MARTIN AND WIFE, ALTON ERWIN MARTIN, ADDITIONAL DEFENDANTS

No. 7419SC750

(Filed 20 November 1974)

Estates § 3; Wills § 34—devise of land for lifetime of beneficiaries —
action remanded

Action for the establishment of plaintiffs' title in and to a certain tract of land devised by their grandfather to their grandmother and their mother "for their lifetime" is remanded for a hearing on its merits.

APPEAL by plaintiffs and additional plaintiff from *Exum*, Judge, 4 March 1974 Civil Session of CABARRUS Superior Court. Heard in the Court of Appeals 17 October 1974.

McRorie v. Query

This action was instituted 10 June 1968, for the establishment of plaintiffs' title in and to a certain parcel or tract of land lying in Cabarrus County, North Carolina, and for possession thereof and for other incidental rights in connection therewith. Thereafter, a motion was entered to reopen a special proceeding which involved the same tract or parcel of land. This special proceeding was entitled, Charles A. Fisher, Executor of George M. Misenheimer, deceased, and J. Clay Query and wife, Ollie M. Query, Movants v. Charles W. Misenheimer, et al, Respondents, and the present plaintiffs as intervenors. The special proceeding was heard in the superior court at the same time as this case, and likewise both matters were appealed to this Court and heard at the same time.

Cole & Chesson by James L. Cole for plaintiff appellants.

Hartsell, Hartsell & Mills, P.A., by William L. Mills, Jr.; Williams, Willeford, Boger & Grady by John Hugh Williams for defendant appellees.

CAMPBELL, Judge.

In this action Judge Exum found, "that the decision in said special proceeding is determinative of the rights of all parties in this cause and therefore renders this action moot, and that summary judgment ought to be allowed in favor of the defendants and the additional defendants." Judge Exum thereupon dismissed this action.

In the special proceeding this Court, in Case No. 7419SC751, filed simultaneously with this opinion, reversed Judge Exum and by said holding no longer made this case moot.

Since this case has not been heard on its merits in the superior court, this case is remanded to the superior court for trial, and the judgment of Judge Exum dismissing this action is reversed.

Reversed and remanded.

Judges BRITT and VAUGHN concur.

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RAYMOND STRICKLAND v. MARLON JACKSON AND CARLTON JACKSON

No. 7411SC641

(Filed 20 November 1974)

1. Damages § 14—transfer of property—competency on question of punitive damages

In an action to recover for personal injuries received by plaintiff when he was assaulted by defendants with a shotgun, evidence that defendants had transferred 100 acres of land to one defendant's wife after the action was commenced was competent upon the question of defendants' ability to respond in punitive damages.

2. Assault and Battery § 3—civil assault—evidence of reputation

While the dispositions of the parties in a civil assault case may be shown by evidence of reputation when there is a plea of self-defense or an issue as to who committed the first act of aggression, testimony in such a case that defendants' general character and reputation were "good, excellent" did not show the disposition of defendants toward peacefulness and violence and was properly excluded by the trial court.

3. Evidence § 48—qualification as expert—waiver of objection

In a civil assault case, defendants waived objection to the qualifications of a police officer to give his opinion concerning the distance at which a shotgun could inflict injuries of the type suffered by plaintiff by failing to object specifically to the qualifications of the witness.

APPEAL by defendants from *Webb, Judge*, 25 February 1974 Session of Superior Court held in HARNETT County. Argued in the Court of Appeals 25 September 1974.

Plaintiff seeks to recover damages for personal injuries suffered as a result of an assault with a shotgun upon him by the defendants. According to plaintiff's evidence, at the time of the assault, plaintiff was in the logging business and was conducting logging operations on property adjoining the defendants' property. Plaintiff asked the defendants if he could use their land to load timber, and the defendants consented to his proposition. Plaintiff used the defendants' property for five or six weeks until he was told by the defendants "to get off their land the next morning because they were having confusion between the family due to the fact that they were letting me use their land." Plaintiff removed his logging equipment the next morning.

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On 8 October 1970 plaintiff was logging on Jarvis Tew's land, which adjoined defendants' land, with his uncle and an employee, Troy Ferguson, when defendant Marlon Jackson emerged from the woods. Plaintiff got down from his Timber Jack and walked toward the defendant. Plaintiff testified that as he approached the defendant Marlon Jackson, he could see that the defendant was carrying a bolt action .22 caliber rifle. Plaintiff testified that the defendant told him that he was going to kill him. Plaintiff stated that the defendant walked to within a foot of him; plaintiff then pushed the gun barrel away with his right hand and hit the defendant with his left hand. Defendant fell down and, after getting up, asked the plaintiff for his gun. Plaintiff refused to give it to him. Plaintiff testified that defendant Marlon Jackson then shouted: "Shoot the hell out of him Carlton," whereupon defendant Carlton Jackson sprang up from behind plaintiff's pickup truck a short distance away and shot the plaintiff in the neck and shoulder with a 12-gauge shotgun. Troy Ferguson, the plaintiff's employee, testified that he did not witness the shooting, but, on hearing a gunshot, he rushed to the place where the plaintiff had been logging and found the plaintiff squatting on his knees. The defendants were standing beside the pickup truck. Each held a gun.

The plaintiff's physician, Dr. James Urbaniak, a specialist in orthopedic surgery at Duke University Medical Center, testified that the plaintiff's right upper extremity from the shoulder to the hand had been paralyzed as a result of the shooting. Plaintiff now has the ability to bend his elbow, but Dr. Urbaniak stated that this is the maximum improvement of which the plaintiff is capable. Dr. Urbaniak testified that the plaintiff will have to have either his arm or his hand amputated and a prosthesis attached. The total cost of an operation, a prosthesis, and hospitalization is anticipated to be approximately \$10,000.00. Plaintiff testified that he has not worked since the date of the assault.

Defendant Marlon Jackson testified that on 8 October 1970 he went to the site of the plaintiff's logging operations to see if the plaintiff was using the Jackson property. The defendant stated that he carried no gun but that his brother, Carlton, who was about one quarter mile away at a hog pen, did have a shotgun. When the defendant got to the site of the plaintiff's operations, the plaintiff picked up a stick and approached the defendant. The defendant testified that he had a chew of tobacco

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in his mouth and turned his head to avoid spitting into the wind. The plaintiff struck the defendant with the stick, cutting his forehead. The defendant Marlon Jackson does not remember anything further until he regained his senses while being dragged back to the hog pen by his brother, Carlton Jackson.

Defendant Carlton Jackson testified that after his brother failed to return from the site of the plaintiff's logging operations, he set out after him. Defendant Carlton Jackson found his brother lying at the feet of the plaintiff. When the plaintiff threatened to kill defendant Carlton Jackson and began advancing upon him, the defendant shot the plaintiff.

Two witnesses testified that they had seen a cut on the defendant Marlon Jackson's forehead. Two other witnesses for the defense gave testimony to the effect that the plaintiff might have been cutting timber on the defendants' property. Dr. John Nance, the defendants' physician, testified that he had treated the defendant Marlon Jackson for a lacerated forehead.

The jury reached a verdict favorable to the plaintiff and awarded the plaintiff \$75,000.00 compensatory damages and \$5,000.00 punitive damages. The defendants appealed.

Chambliss, Paderick, Warrick & Johnson, P.A., by Joseph B. Chambliss, for the defendant-appellants.

Bryan, Jones, Johnson, Hunter & Greene, by C. M. Hunter, for the plaintiff-appellee.

BROCK, Chief Judge.

[1] Defendants contend that the trial court committed error when it permitted testimony concerning the transfer of real property by the defendants subsequent to the assault. The plaintiff's counsel first inquired into defendants' ownership of land on cross-examination upon the question of the defendants' financial ability to respond in punitive damages. Testimony elicited by the plaintiff's counsel indicated that the defendants' property, consisting of approximately 100 acres, was transferred to defendant Carlton Jackson's wife in October, 1971, subsequent to the commencement of this action by the plaintiff. Defendants concede that evidence of the financial condition of a defendant is admissible in an action where punitive damages may be awarded, but argue that the evidence in this case went beyond that rule to the defendants' prejudice. We disagree.

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It is well settled in North Carolina that “[o]rdinarily, a party’s financial ability to respond in damages, or to pay an alleged debt, is totally irrelevant to the issue of liability; and the admission of evidence tending to establish such ability is held to be prejudicial, except in cases warranting an award of punitive damages.” *Harvel’s, Inc. v. Eggleston*, 268 N.C. 388, 392, 150 S.E. 2d 786. Such evidence is admissible “on the theory that the allowance of a given sum would be a greater punishment to a man of small means than to one possessing larger wealth.” 22 Am. Jur. 2d, *Damages*, § 322 (1965) (footnote omitted). The evidence elicited by the plaintiff’s counsel was competent upon the question of ability to respond in punitive damages. This assignment of error is overruled.

[2] Defendants contend that the trial court committed error when it failed to permit witnesses for the defense to testify as to the character and reputation of the defendants. It is well settled that “[e]vidence of the good or bad character of either party to a civil action is generally inadmissible. Such evidence is regarded as being too remote to be of substantial value, as tending to confuse the issues and unduly protract the trial, and (most important of all) as offering a temptation to the jury to reward a good life or punish a bad man instead of deciding the issues before them.” 1 Stansbury, North Carolina Evidence, § 103 (Brandis Revision, 1973) (footnotes omitted). Defendants argue that exceptions to the general rule would permit the introduction of character evidence in this case. Although the exceptions do not include cases of civil assault and battery, the exceptions do “suggest a general practice of admitting character evidence in civil cases ‘where a moral intent is marked and prominent in the nature of the issue,’ . . . ” 1 Stansbury, North Carolina Evidence, § 103 (Brandis Revision, 1973) (footnotes omitted).

The introduction of character evidence in criminal actions is an historical, special dispensation to criminal defendants whose life or liberty is at stake. A majority of courts have refused to allow character evidence in civil actions due to time consumption and detraction from the issues. But a growing minority of jurisdictions “has been impressed with the serious consequences to the party’s standing, reputation, and relationships which such a charge, even in a civil action, may bring in its train, and has followed the criminal analogy, by permitting the party to introduce evidence of his good reputation for

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the trait involved in the charge." McCormick on Evidence, § 192 (1972) (footnotes omitted). We note, however, that civil actions for assault are treated differently. See 154 A.L.R. 121; 1 A.L.R. 3d 571. A succinct discussion is found in McCormick on Evidence:

"When the issue is merely whether the defendant committed the act charged, then the courts would presumably admit or exclude defendant's evidence of good reputation according to their alignment with the majority or minority view on the general question, . . . But when the defendant pleads self-defence, he may show the plaintiff's reputation for turbulence if he proves it was known to him, on the issue of reasonable apprehension. Similarly, when on a plea of self-defence or otherwise there is an issue as to who committed the first act of aggression, most courts (regardless of their alignment on the general question) seem to admit evidence of the good or bad reputation of both plaintiff and defendant for peacefulness as shedding light on their probable acts. This cannot be justified, as is sometimes attempted, on the ground that character is here 'in issue' — the issue is clearly one of conduct—but probably there is in these cases a special need even beyond that in most cases of charges of crime in civil actions, for knowing the dispositions of the parties." McCormick on Evidence, § 192 (1972) (footnotes omitted).

Defendants rely on the case of *Hess v. Marinari*, 81 W. Va. 500, 94 S.E. 968 (1918), as supporting the proposition that character evidence is admissible in civil actions for assault. In *Hess* there was an assault and a claim for punitive damages. The court noted that such a claim requires a finding of criminal intent and ruled that the defendant was entitled, as in a criminal case, to show his good character. In *Skidmore v. Star Ins. Co.*, 126 W.Va. 307, 27 S.E. 2d 845 (1943), the court rejected the admission of evidence of character to show conduct in civil cases and distinguished *Hess* on the ground that criminal intent was there material. McCormick on Evidence, 460, n. 94 (1972). Nevertheless, we are persuaded that when there is a plea of self-defense, or an issue as to who committed the first act of aggression, it is competent to show, through evidence of reputation, the dispositions of the parties. The character witness for the defendants was allowed by the trial court to put his answer in the record. He testified, for the record, that defendants' gen-

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eral character and reputation were "good, excellent." Neither the question propounded nor the answer given was designed to show the disposition of defendants towards peacefulness or violence. This assignment of error is overruled.

[3] Defendants contend that the trial court committed error when it allowed the plaintiff's rebuttal witness, Ralph Barefoot, a police officer, to give his opinion concerning the distance at which a shotgun could inflict injuries of the type suffered by the plaintiff. We note that this question was important on the issue of self-defense pleaded by the defendants; however, the defendants objected generally to the question and failed to object specifically to the qualifications of the witness to so testify. Had the defendants objected specifically, the witness' qualifications could have been more fully developed. It is well settled that failure to lodge a specific objection that a witness is not qualified as an expert is waived if not made in apt time. 1 Stansbury, North Carolina Evidence, § 133 (Brandis Revision, 1973). This assignment of error is without merit.

Defendants contend that the trial judge erred in his charge to the jury on the issue of self-defense. We have reviewed the charge and find that it sufficiently stated and applied the law to the facts of the case.

In our opinion defendants had a fair trial free from prejudicial error.

No error.

Judges MORRIS and MARTIN concur.

JIMMY R. ANDREWS v. BUILDERS AND FINANCE, INCORPORATED, A NORTH CAROLINA CORPORATION

No. 743SC193

(Filed 20 November 1974)

1. Witnesses § 5—evidence competent for corroboration

In an action by counterclaim to recover the balance allegedly due on the purchase of a house, the trial court properly overruled defendant's general objection to plaintiff's testimony as to statements he had made to a loan officer concerning the price he had agreed to

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pay defendant for the house since the testimony was admissible to corroborate plaintiff's trial testimony as to the agreed contract price.

2. Contracts § 26—purchase price of house—evidence of resale price

In an action to recover the balance allegedly due on the purchase of a house, the price for which the buyer resold the house some two years after the transaction in question was not relevant to prove any fact in issue.

3. Accord and Satisfaction § 1; Contracts § 27—purchase price of house—sufficiency of evidence to support judgment—no accord and satisfaction

In an action by counterclaim to recover the balance allegedly due on the purchase price of a house built by defendant for plaintiff on a cost plus basis, the evidence, although conflicting, was sufficient to support the court's finding that the parties had agreed on a final purchase price of \$35,570, such finding supported judgment for plaintiff buyer, and the court's reference in its conclusions to an "accord and satisfaction" when defendant accepted \$28,000 plus a note for \$7,570 as the final purchase price will be treated as surplusage.

APPEAL by defendant from *Winner, Judge*, September 1973 Civil Session of Superior Court held in CRAVEN County.

Civil action to recover \$5,553.00 which plaintiff alleged was balance due him as real estate agent's commissions for sales effected by plaintiff for defendant under an agreement between the parties. Defendant denied the obligation and filed a counterclaim seeking recovery of \$4,496.83 which defendant alleged was the balance of purchase price due it by plaintiff on account of a dwelling house and lot which defendant had sold to plaintiff. The parties waived jury trial, and after hearing evidence presented by both parties, the court entered judgment making findings of fact, conclusions of law, and adjudging as follows:

"1. That the plaintiff was employed by the defendant sometime in 1971 as a salesman of the defendant's real estate; that the terms of the employment were that he would receive 3% of the amount of real estate sold by him as compensation for his services.

"2. That sometime in 1971 the defendant agreed to build and sell to the plaintiff a home; that the plaintiff agreed to pay to the defendant its cost plus 5% as compensation.

"3. That on September 10, 1971 the defendant executed a deed to the plaintiff for the house and property

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hereinbefore mentioned; that at that time the plaintiff and defendant agreed that the final purchase price for the house and property was \$35,570.00; that at that time plaintiff paid \$28,000.00 which he had secured by borrowing the said sum from a financial institution and gave to the defendant a note for \$7,570.00 and a deed of trust on the property securing the said note, which the defendant accepted as payment; that a copy of the note is attached to this judgment as Exhibit 'A' and is by reference made a part of the findings of fact.

"4. That in his capacity as real estate salesman for the defendant, plaintiff sold six pieces of property; that the defendant paid some of the commissions to him in cash but that the sum amount of \$4,696.00 is still owed to him by the defendant on the commissions due him.

"5. That the last sale which the plaintiff made for the defendant was consummated on January 22, 1972.

"From the foregoing findings of fact the court concluded as a matter of law

"1. That the acceptance by the defendant of the \$28,000.00 plus the note for \$7,570.00 on September 10, 1971 as the final purchase price was an accord and satisfaction of the purchase described hereinabove;

"2. That the plaintiff owes nothing to the defendant on the said contract because of the said accord and satisfaction;

"3. That the plaintiff is entitled to recover the unpaid commissions due him, i.e. \$4,696.00 plus interest from January 22, 1972.

"From the foregoing findings of fact and conclusions of law it is, therefore ordered and decreed that the plaintiff recover of the defendant the sum of \$4,696.00 plus interest from January 22, 1972; that the defendant pay the costs of the action; and that the defendant's counterclaim is dismissed."

From this judgment defendant appealed.

Ward, Tucker, Ward & Smith, P.A., by Michael P. Flanagan for plaintiff appellee.

Dunn & Dunn by Raymond E. Dunn for defendant appellant.

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PARKER, Judge.

[1] Over defendant's general objections, plaintiff was permitted to testify during his examination in chief to statements he had made to the lending officer of the Savings and Loan Association when he applied for the \$28,000.00 loan, proceeds of which were used in purchasing the house and lot from defendant, concerning the contract price for the property. Plaintiff testified that he made these statements some forty-five to sixty days prior to closing the loan and that he had told the lending officer that he was paying \$35,500.00 for the property. Also over defendant's general objection, plaintiff was permitted to introduce a copy of the loan application which he testified he had filled out and which showed the contract price for the house and lot. Defendant now contends the admission of this testimony was error in that it "constituted self-serving declarations and was prejudicial to the defendant."

That a prior out-of-court statement of a witness may have been "self-serving" does not describe an independent ground of objection. "If the statement is hearsay, and is not admissible under some specific rule, it is subject to exclusion regardless of whether it is self-serving, neutral, or self-disserving." 1 Stansbury's N. C. Evidence, § 140, p. 466 (Brandis Revision, 1973). Here, the prior statements which the witness testified he had made to the lending officer were hearsay in the sense that at the time the statements were made the witness was not under oath or then subject to cross-examination, though at the time he testified concerning them both of these conditions prevailed. However, "[w]hether former assertions of the witness himself, related by him in his testimony, are hearsay is of no particular consequence in North Carolina, in view of their free admissibility for purposes of corroboration." 1 Stansbury's N. C. Evidence, § 138, p. 459, n. 2 (Brandis Revision, 1973).

In the present case the evidence concerning plaintiff's statements to the lending officer as to the price he had agreed to pay defendant for the property clearly had no relevance to prove that defendant also agreed to that price, and the evidence would have been incompetent if offered for that purpose. It was, nevertheless, admissible for the purpose of corroborating plaintiff's testimony concerning his own understanding of the agreed contract price, and for that limited purpose of strengthening his credibility "[t]he witness himself may testify to the making of the statements, and he may do this even in the course of his

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examination in chief if his relationship to the case is such as to justify an inference of bias or otherwise reflect upon his credibility." 1 Stansbury's N. C. Evidence, § 51, p. 148 (Brandis Revision, 1973). Since the evidence was admissible, though for a limited purpose, defendant's general objections were properly overruled.

[2] On cross-examination plaintiff testified that shortly before the trial he had sold the house which he had purchased from defendant. When defendant's counsel asked plaintiff how much he had sold the house for, the court sustained objection interposed by plaintiff's counsel. Defendant now assigns this ruling as error, contending that his counsel's cross-examination of plaintiff was thereby unduly limited. We find this assignment without merit, first, because the price for which plaintiff sold the house almost two years after he purchased it from defendant had no relevance to prove any fact at issue in this litigation, and, second, because what the witness's answer would have been, had he been required to answer, does not appear in the record. It is well established that the sustaining of an objection to a question directed to a witness, whether on direct or cross-examination, will not be held prejudicial when the record does not show what the answer would have been had the objection not been sustained. *State v. Felton*, 283 N.C. 368, 196 S.E. 2d 239 (1973); *State v. Poolos*, 241 N.C. 382, 85 S.E. 2d 342 (1955).

Defendant excepted to the court's finding of fact No. 3 in which the court found as a fact that on 10 September 1971, when defendant executed deed to the plaintiff, "the plaintiff and defendant agreed that the final purchase price for the house and property was \$35,570.00." Although the evidence on this point was in sharp conflict, the court's finding of fact is supported by competent evidence in the record. Therefore, the trial court's findings of fact are conclusive upon this appeal. 1 Strong, N. C. Index 2d, Appeal and Error, § 57, p. 223. Accordingly, defendant's assignment of error based on its exception to finding of fact No. 3 is overruled. Defendant made no exception to any other finding of fact made by the trial judge.

[3] Defendant duly excepted and now assigns error to the court's first conclusion of law, in which the court concluded "[t]hat the acceptance by the defendant of the \$28,000.00 plus the note for \$7,570.00 on September 10, 1971 as the final purchase price was an accord and satisfaction of the purchase

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described hereinabove." In support of this assignment defendant points out that plaintiff did not affirmatively plead an accord and satisfaction, as is required by G.S. 1A-1, Rule 8(c). Additionally, defendant contends that the requisites for an accord and satisfaction have not been shown in the present case in that the parties, having agreed on a price computed as defendant's cost plus 5% and defendant's evidence showing that this produced a figure of \$44,862.17, the payments totaling \$35,570.00 made at the time of closing the sale were but a partial payment on an undisputed claim and hence did not constitute a binding accord and satisfaction because not supported by consideration. We point out, however, that although defendant's evidence did show a cost plus 5% figure of \$44,862.17, plaintiff's evidence would support a contrary finding. Plaintiff testified that in preparation for closing the purchase of the property he approached Mr. Lee, the President of defendant corporation, and "asked him what was the final price and he said \$35,500.00." There was also uncontradicted evidence that defendant closed the sale and delivered deed conveying the property to plaintiff upon receipt by defendant of payments, consisting of cash and a second mortgage purchase money note, totaling \$35,570.00. The note bore the notation on its face that it was "given for balance of purchase price." Thus, this was not a case, as defendant contends, of an undisputed claim based on a contract under which both parties clearly agreed that the purchase price was to be \$44,862.17. There was at least evidence from which the court could find, as it did find, that the parties "agreed that the final purchase price for the house and property was \$35,570.00." This finding of fact was in itself sufficient to support the judgment, and the court's reference in its conclusions of law to an "accord and satisfaction" may be treated as surplusage. It may be that the trial court, in referring to an "accord and satisfaction" in its conclusions of law, was thinking in terms of the defendant seller accepting a second mortgage note for a portion of the purchase price rather than requiring that the entire purchase price be paid by cash. If so, any question as to whether such a conclusion was, or was not, correct is now moot, since we note that all of the evidence shows that the \$7,570.00 purchase money note was paid in full prior to the trial of this case.

The court's findings of fact being supported by competent evidence and those findings in turn supporting the judgment rendered, the judgment appealed from is

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Affirmed.

Chief Judge BROCK and Judge BAILEY concur.

STATE OF NORTH CAROLINA v. TERRY STEPHEN HILL

No. 7425SC789

(Filed 20 November 1974)

1. Constitutional Law § 30—speedy trial—23-month delay between offense and trial

Defendant was not denied the right of a speedy trial on a secret assault charge by a 23-month delay between the offense and trial where defendant was in prison during such time, no detainer was issued and the charge did not affect defendant's prison record, the delay was caused by the court's occupation with other cases, defendant made no request for trial, and defendant has shown no prejudice because of the delay.

2. Criminal Law § 91—two assault charges based upon same incident—denial of continuance of one charge

Where defendant was charged in separate indictments with secret assault and with felonious assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in the denial of defendant's motion for continuance of the felonious assault charge made on the ground that the indictment in such case was returned just one day prior to trial and he was not informed of it until a few minutes before trial since the two assault charges grew out of the same occurrence, the same attorney was appointed to represent defendant on both charges, and defendant has shown no prejudice in the trial of both charges at the same time.

3. Constitutional Law § 34; Criminal Law § 26—double jeopardy—secret assault—felonious assault—same occurrence

Defendant was not placed in double jeopardy by his conviction of secret assault and of felonious assault with a deadly weapon with intent to kill inflicting serious injury growing out of the same occurrence since each offense has additional and distinct elements not present in the other.

APPEAL by defendant from *Webb, Judge*, 27 May 1974 Criminal Session of BURKE County Superior Court. Heard in the Court of Appeals 22 October 1974.

The defendant was tried upon two separate bills of indictment. In one he was charged with a secret assault pursuant to G.S. 14-31. In the other he was charged with an assault with a

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deadly weapon with intent to kill inflicting serious injury, pursuant to G.S. 14-32(a). To the first bill, he entered a plea of not guilty; and to the second bill, he stood mute; and the court entered a plea of not guilty for him. The two cases were consolidated for trial since they both grew out of the same set of circumstances. The jury returned a verdict of guilty in each case; and the defendant was given an active prison sentence of 20 years in the secret assault case and a sentence of 10 years on the assault with a deadly weapon case, the 10 years to run concurrently with the 20-year sentence. The defendant noted an appeal to this Court.

Upon the trial before the jury, the defendant offered no evidence. The evidence on behalf of the State tended to show the following facts.

On 1 July 1972, the defendant was confined in the Western Correctional Center located in Burke County, North Carolina, and was on the 14th floor of that facility. On this floor there were four halls, sections, or units. They were designated A, B, C, and D. On B hall there were 12 individual rooms, and on A hall there were 10. In D and C halls there were similar rooms. There were also wash areas, bathrooms, a mop room, and a day room. In the day room there were eating tables, a television set and other facilities for recreation. In the mop room were contained a mop bucket, brooms, brushes and cleaning equipment. The mop bucket had a handle attached thereto which enabled the mop to be squeezed out into the bucket. The 14th floor on 1 July 1972, was for medium-custody inmates and served as a receiving floor for new inmates being transferred from other units into this center. There were fire escapes on each end of the building, together with four elevators and one additional stairwell. On the third shift there was one security officer to each floor. There were various automatic locks and other security provisions.

Jack A. Ledford was the security officer on the 14th floor on the night of July 1, 1972. He came on duty at 11:00 o'clock p.m. There were some 30 or 40 inmates on the 14th floor at the time; and when Ledford came on duty, he told the inmates to be quiet, and if they did not make too much noise, they could watch television. Ledford announced that he was working two floors at that time, and he went down to the 13th floor. While Ledford was gone, the defendant unscrewed the mop handle from the mop bucket. This handle was about three feet long

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and consisted mostly, if not all, of metal. After securing the handle, the defendant wrapped a towel around it and then placed himself in the mop room beside the entrance door. About midnight Ledford had returned to the 14th floor and another inmate, Costner, requested Ledford to go with him to the mop room in order to return a broom that Costner had been using. When Costner and Ledford reached the mop room, Costner shoved Ledford into the room; and at that time the defendant struck Ledford over the head with the metal handle of the mop. The defendant struck Ledford several times over the head and across the forehead. Ledford received very serious injuries as a result of these blows and was rendered completely unconscious for sixteen days. Ledford has lost the greater portion of his eyesight and has been permanently incapacitated as a result of his injuries. Following the attack, the defendant procured the keys and wallet from Ledford and went to the fire escape door in an effort to get out. When he was unable to get out through the fire escape door, he threw the keys back on the floor and went to his own room. Other inmates reported the incident to the ground floor and help came and removed Ledford to the hospital.

Prior to the assault and when Ledford first came on duty at about 11:00 p.m., he had stated to all the inmates, "Stay the hell out of the halls." and by his words and conduct had apparently antagonized the defendant because the defendant made the statement to the effect that he would kill Ledford.

Attorney General James H. Carson, Jr., by Associate Attorney Richard F. Kane for the State.

Peter Foley and John H. McMurray for defendant appellant.

CAMPBELL, Judge.

[1] Defendant asserts that this action should have been dismissed upon his motion for that he was denied the right to a speedy trial. This offense occurred 1 July 1972, and the defendant was not tried therefore until 27 May 1974. The criterion to be applied is stated in *State v. Harrell*, 281 N.C. 111, 115 187 S.E. 2d 789, 791 (1972), as follows:

"The threefold purpose of the constitutional guaranty of a speedy trial is to protect the accused against prolonged imprisonment, relieve him of the anxiety and public sus-

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picion attendant upon an untried accusation of crime, and prevent him from being exposed to trial after the lapse of so great a time that the means of proving his innocence may have been lost. [Citations omitted.]

The word *speedy* cannot be defined in specific terms of days, months or years, so the question whether a defendant has been denied a speedy trial must be answered in light of the facts in a particular case. Four factors should be considered in determining the reasonableness of a delay: the length of the delay, the reason for the delay, prejudice to the defendant, and waiver by the defendant. [Citations omitted.]”

The record discloses that no detainer was ever issued or recorded in the defendant's prison jacket relating to the indictment for secret assault. Thus this case did not effect the defendant's prison record. The defendant completed all sentences on unrelated offenses and was released from Western Correctional Center on or about 24 April 1974. The defendant was then transferred to jail for confinement pending trial or release on bond on the present charges. On 19 April 1974, the defendant made a motion for an appearance bond. This came on for hearing on 27 April 1974, and the judge indicated that if defendant were not tried at the next term of criminal court, he would be released on a \$1,000 bond. The defendant was tried at the next criminal term of court. The defendant never requested that this case be placed upon the court calendar for trial. The record further discloses that any delay in the trial was not due to neglect or wilfulness on the part of the State but rather because of court time being occupied with other cases. The defendant does not show any prejudice in the instant case because of any delay in his trial. The defendant did not show any absence of witnesses or any other loss of ability to prove his innocence. In fact, one witness, Costner, whose name the defendant had suggested, was another inmate whom the State offered to procure and have available if the defendant desired him. The defendant stated that this witness was not desired.

In the absence of any demand for a speedy trial, prejudice to the defendant, neglect or wilful delay on the part of the prosecution, we find no error in the denial of the motion to dismiss for failure to afford a speedy trial.

[2] The defendant next assigns as error the refusal of the court to grant a continuance of the charge of an assault with a deadly

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weapon with intent to kill inflicting serious injury. The defendant asserts that this indictment was returned just one day prior to the trial and that he was not informed of it until a few minutes before the trial. While ordinarily this might justify a continuance of a trial, we do not think that in the instant case it did so. The assault charge grew out of the same occurrence, the same attorney was appointed to represent the defendant, and the defendant shows no prejudice as a result of the second offense being tried at the same time with the first offense. In the absence of any showing of any prejudice as a result of the trial court's denial of the motion for a continuance, we find no merit in this assignment of error.

[3] The third assignment of error argued by the defendant is that the two charges against the defendant growing out of the same episode constituted double jeopardy in that one offense was split into two parts.

The rule governing this has been summarized as follows:

“Where the same act constitutes a violation of two statutes and, in addition to any common elements, an additional fact must be proved in each which is not required in the other, the offenses are not the same in law and in fact, and conviction or acquittal in the one will not support a plea of former jeopardy in the other. . . .” 2 Strong, N. C. Index 2d, Criminal Law, § 26, p. 520. In accord, *State v. Birkhead*, 256 N.C. 494, 124 S.E. 2d 838 (1962).

In the instant case, the offense of secret assault contains five elements: (1) assault and battery, (2) deadly weapon, (3) intent to kill, (4) secret manner, and (5) malice. The second offense with which the defendant was charged, namely, assault with a deadly weapon with intent to kill inflicting serious injury, requires: (1) assault and battery, (2) deadly weapon, (3) intent to kill, and (4) serious injury.

Since each offense has additional and distinct elements not present in the other, an accused may be convicted of both offenses. This was answered in *State v. Richardson*, 279 N.C. 621, 629, 185 S.E. 2d 102, 108 (1971), as follows:

“ . . . We perceive no sound reason why two felonies should be treated as one simply because they share a single essential element, when they consist of additional separate elements.”

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An indictment for secret assault will not support a conviction for felonious assault with a deadly weapon with intent to kill inflicting serious injuries as the elements are different. See *State v. Lewis*, 274 N.C. 438, 164 S.E. 2d 177 (1968).

We, therefore, find no merit in this assignment of error.

The remaining assignments of error brought forward by the defendant pertain to the charge of the trial judge to the jury and particularly with regard to the meaning of secret assault.

We have reviewed the charge; and when considered as a whole, we think the charge was adequate and sufficient. The charge with regard to secret assault conforms to the charge which this Court approved in *State v. Lewis*, 1 N.C. App. 296, 161 S.E. 2d 497 (1968). While *State v. Lewis, supra*, was found in error and remanded in 274 N.C. 438, 164 S.E. 2d 177 (1968), this error was in another aspect of the case and not because of any error pertaining to the charge of secret assault.

The charge as a whole was free of prejudicial error.

We think the defendant had a fair trial free of prejudicial error, and we, accordingly, find

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. ROBERT EARL BARFIELD

No. 748SC137

(Filed 20 November 1974)

1. Searches and Seizures § 4—entry under search warrant—demand of entry—silence of homeowner—entry lawful

Officers' method of entry into defendant's home was lawful where the officers approached his home armed with a warrant to search for heroin, knocked on defendant's door and at the same time announced their identity and their purpose for being there, waited for a minute and a half to two minutes during which time they heard nothing, kicked in the door and entered defendant's home, again announcing their identity and calling for defendant.

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2. Criminal Law § 162—assignment of error to evidence—failure to comply with rules of practice

Defendant's assignment of error to the trial court's admission of certain evidence did not comply with the Rules of Practice of the Court of Appeals where the assignment did not show what question was intended to be presented for consideration without the necessity of going beyond the assignment itself and where the assignment constituted a grouping under a single assignment of error of a number of exceptions which related to distinct and different questions of law.

3. Narcotics § 4—constructive possession of heroin—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for felonious possession of heroin where it tended to show that a small amount of heroin was found in a plastic bag in defendant's garbage can which was located under the carport only a few steps from the door to defendant's house, even though defendant denied any knowledge of the contraband nature of the bag's contents.

4. Criminal Law § 51—heroin user—opinion evidence—qualification as expert

The trial court did not err in allowing a witness to express an opinion that powder sold by defendant on an earlier occasion to the witness's uncle was good heroin without first finding that the witness was an expert where the witness's testimony as to her previous experience and use of heroin qualified her to express the opinion given and where defendant did not request that the trial court make an express finding as to the witness's qualification.

5. Criminal Law § 162—assignment of error to evidence—questions raised

Where defendant's assignment of error challenged a witness's testimony on the ground that her qualifications as an expert were not established, he cannot contend that her testimony should have been excluded because its only relevance was to show defendant's disposition to commit a crime.

APPEAL by defendant from *Martin (Perry)*, Judge, 25 June 1973 Session of Superior Court held in GREENE County.

Defendant was indicted for felonious possession of heroin and pled not guilty. The State presented evidence that on the morning of 6 October 1972 S.B.I. Agents and local officers, after obtaining a search warrant authorizing search of defendant's dwelling for heroin, searched defendant's residence. No heroin was found inside the building, but in a garbage can which was under the carport, ten to twelve feet from the door entering the house, the officers found a plastic bag containing two playing cards on which there was a white powder residue. The State's chemist scraped the powder from the cards, analyzed

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it, and testified that in his opinion the powder contained heroin. The S.B.I. Agent in charge of the search testified that defendant was present when the search was made and that at that time defendant admitted he had placed the plastic bag and its contents in the garbage can.

Defendant testified that he never possessed any heroin at any time, that when he got home from work on the night before the search he discovered there was a lot of trash in his yard, that he picked this up and put it in the garbage can, and that he did not know how the plastic bag got in his garbage can unless he picked it up during the time he was gathering the trash in his yard at night or unless somebody else put it in the can.

The jury found defendant guilty as charged, and from judgment imposing a prison sentence, defendant appealed.

Attorney General Morgan by Associate Attorney C. Diedrich Heidgerd for the State.

Chambers, Stein, Ferguson & Lanning by Charles L. Becton for defendant appellant.

PARKER, Judge.

[1] Defendant moved to suppress all evidence obtained as result of the search, contending that the search was unlawful on a number of grounds. After conducting an extensive voir dire examination, the court entered an order making findings of fact on the basis of which the court concluded that the search was lawful. Defendant now contends this ruling was error, attacking the legality of the search on the sole ground that the method of entry employed by the officers was unlawful. Defendant does not bring forward in his brief or argument the other grounds on which at the trial he attacked the legality of the search warrant, nor does the record support any of those grounds.

Considering the record as it pertains to the sole ground upon which defendant now contends that the search was illegal, evidence at the voir dire hearing pertinent to the method of entry was as follows: The officers arrived at defendant's house during daylight hours, at about 8 o'clock in the morning of 6 October 1972. They were armed with a valid search warrant. They had previously received information from their confidential source that defendant had told the informer "to come

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back on the 6th and there would be a shipment of heroin at that time." When the officers arrived, they found defendant's car and truck in the driveway. They thus had reasonable basis to believe he was at home. Their informer had also told them that defendant would probably attempt to destroy evidence, "[p]ossibly by the use of the bathroom," and the officers had reasonable grounds to believe that this might be done and could be quickly accomplished. One officer went to the front of the house and one to the rear, while S.B.I. Agent Thompson and the two remaining officers went to the carport door. Thompson testified that he knocked on the door and at the same time announced in a tone "probably a little louder than normal voice": "This is the S.B.I.; open the door; I have a search warrant." After waiting "a minute and a half to two minutes" and hearing nothing, Thompson kicked the door in and entered the house, again announcing who he was and calling for defendant. The officers advanced into the house and found defendant sitting upon the edge of the bed in the first bedroom entered.

We find the trial court's essential findings of fact concerning the entry to be supported by the evidence and that these findings support the court's conclusion that the entry was lawful. The officers did knock, announce their identity, state the source of their authority, request admission, and then wait a reasonable length of time before entering the house. The fact that silence greeted their demand for entrance did not make their entry unlawful, see *State v. Hoffman*, 281 N.C. 727, 190 S.E. 2d 842 (1972), and we hold that under the circumstances of this case the forcible nature of the entry did not render the subsequent search illegal.

[2] Defendant next contends that the trial court erred "by admitting into evidence, over the defendant's objections, testimony which was incompetent, irrelevant, immaterial, remote, inconclusive, conclusory, prejudicial and inflammatory to the defendant." The assignment of error on which this contention is based contains the above language, followed by a long listing of exception numbers and page numbers where presumably the exceptions may be found. This assignment of error does not show what question is intended to be presented for consideration by this Court without the necessity of going beyond the assignment itself, and for that reason it does not conform to the requirements of the Rules of Practice of this Court or of our Supreme Court. *In re Will of Adams*, 268 N.C. 565, 151 S.E. 2d 59

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(1966); *Lancaster v. Smith*, 13 N.C. App. 129, 185 S.E. 2d 319 (1971). It also fails to comply with such Rules of Practice for the additional reason that it constitutes a grouping under a single assignment of error of a number of exceptions which relate to distinct and different questions of law. It is not enough that all exceptions grouped under a single assignment of error may present questions in the general field of the law of evidence. *Duke v. Meisky*, 12 N.C. App. 329, 183 S.E. 2d 292 (1971). Accordingly, defendant's assignment of error directed to the court's rulings admitting evidence is ineffectual to bring up any matter for appellate review.

[3] Defendant's motions for nonsuit were properly overruled. An accused has possession of contraband material within the meaning of the law when he has both the power and intent to control its disposition and use. "Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which is sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E. 2d 706, 714 (1972). Here, there was evidence that heroin was found on defendant's premises. The trash can in which it was found was under the carport only a few steps from the door to his house. There was also evidence that defendant admitted that he placed the plastic bag which contained the heroin in the trash can, though he denied any knowledge of the contraband nature of its contents. We hold the evidence in this case sufficient to support the jury's finding defendant knowingly possessed the heroin found in his trash can, and the fact that only a small amount of heroin was here involved did not entitle defendant to a judgment of nonsuit. *State v. Young*, 20 N.C. App. 316, 201 S.E. 2d 370 (1973); *State v. Thomas*, 20 N.C. App. 255, 201 S.E. 2d 201 (1973), cert. denied, 284 N.C. 622, 202 S.E. 2d 277 (1974).

[4] The State presented the testimony of Annie C. Pollock, who admitted she had formerly been a drug addict and that at the time of testifying was serving a prison sentence for possession of heroin. This witness was permitted to testify over defendant's objections that she was present in Kinston, N. C., in the latter part of September, 1972, when defendant sold to her uncle some packages of white powder which defendant then stated to be "good dope," that the purpose of her being present on that occasion was to test the powder after her uncle got it, that she

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did test it by injecting it into her veins, and that in her opinion the white powder contained "[g]ood heroin." Defendant now contends that the trial court erred in allowing Pollock to express an opinion that the powder contained heroin, contending there was no showing that she was properly qualified to give such an opinion. We find no error in this regard.

Admittedly the witness was no chemist and did not purport to be. She testified, however, that she had "taken heroin thousands of times" by injecting it through her veins with a needle, and on cross-examination stated that she analyzed the substance "[t]he way the junkies do," she "took some of it." She further testified on cross-examination:

"No, it couldn't have been sugar. Sugar won't cook up like the way heroin does. It couldn't have been powder either. It wouldn't cook the same. I know heroin from experience. I know the way, all right, the way that it looks and smells and what not, you can tell it from other powders that look like it if you know what you are doing."

We hold that there was a sufficient showing that the witness's previous experience qualified her to express the opinion given. Furthermore, there is no basis for defendant appellant's complaint that the court made no express finding that the witness was qualified to give opinion testimony as an expert witness. Appellant made no request for such a finding, and "[i]n the absence of a request by the appellant for a finding by the trial court as to the qualification of a witness as an expert, it is not essential that the record show an express finding on this matter, the finding, one way or the other, being deemed implicit in the ruling admitting or rejecting the opinion testimony of the witness." *State v. Perry*, 275 N.C. 565, 572, 169 S.E. 2d 839, 844 (1969).

[5] In connection with appellant's assignment of error relating to Pollock's opinion testimony, defendant now contends that her entire testimony as to what occurred at the meeting in Kinston between herself, her uncle, and defendant in September should have been excluded because, so defendant argues, its only relevance was to show defendant's disposition to commit a crime. The assignment of error, however, does not present this question, since it was limited to the question as to the admissibility of the witness's opinion testimony and did not purport to raise any question as to admissibility of testimony as to the

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entire transaction. Moreover, in our opinion the testimony was relevant to show defendant's guilty knowledge of the nature of the contraband substance which he was charged with possessing and to show his intent to possess such a substance. *State v. Johnson*, 13 N.C. App. 323, 185 S.E. 2d 423 (1971), cert. allowed, 280 N.C. 724, 186 S.E. 2d 926 (1972), appeal dismissed, 281 N.C. 761, 191 S.E. 2d 364 (1972).

Finally, defendant assigns error to portions of the court's charge to the jury. In our opinion the charge considered as a whole, was free from prejudicial error.

No error.

Chief Judge BROCK and Judge BAILEY concur.

STATE OF NORTH CAROLINA v. LINWOOD CRANDALL

No. 743SC780

(Filed 20 November 1974)

1. Criminal Law § 7— entrapment — investigative methods of undercover agents

In a prosecution for possession and sale and delivery of MDA, defendant's cross-examination of State's witnesses about investigative methods used by undercover agents in the detection of crime, but which did not bear upon the specific offenses with which defendant was charged, was neither material nor relevant to the defense of entrapment.

2. Criminal Law § 7— entrapment — necessity for inducement

Entrapment involves more than affording the opportunity to commit a crime; it requires inducement without which defendant would have had no criminal intent to commit the offense.

3. Criminal Law § 7— entrapment — jury question

Prosecution for possession and sale or delivery of MDA was properly submitted to the jury under appropriate instructions concerning entrapment where the State's witnesses testified that an undercover agent merely agreed to purchase narcotics which defendant offered to procure and defendant claimed that he obtained the narcotics at the urgent request of a second undercover agent.

4. Criminal Law § 21— motion for preliminary hearing

The trial court properly denied defendant's motion for a preliminary hearing after an indictment had been obtained.

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5. Constitutional Law § 30—speedy trial—extension of recess for another hearing

Defendant was not denied his right to a speedy trial when the trial judge extended the noon recess until he could conduct another previously scheduled but unrelated hearing.

6. Criminal Law § 87—leading questions

The trial court did not abuse its discretion in permitting the State to ask leading questions on direct examination.

7. Criminal Law § 42—chain of custody of MDA

Exhibits and testimony identifying a white powder as MDA were properly admitted where an undercover agent testified he retained possession of the powder from the time he acquired it from defendant until he handed it over to the S.B.I., and it was retained by the S.B.I. until presented in court.

8. Criminal Law §§ 51, 99—finding witness was expert—expression of opinion

The trial court did not express an opinion on the evidence by finding in the presence of the jury that a witness was an expert in forensic chemistry.

9. Criminal Law § 89—cross-examination—prior convictions—prior prison term

State's cross-examination of a defense witness on details of prior convictions and of defendant on a previous prison term was not improper since a witness may be cross-examined as to prior convictions and defendant had already testified on direct examination that he had been in prison.

10. Constitutional Law § 33—privilege against self-incrimination—court's rulings

Trial court's rulings upon questions asked a defense witness concerning the witness's addiction to heroin, a plea of *nolo contendere* to a charge of distribution of heroin and prior dealings with an undercover agent were for the protection of the witness's Fifth Amendment privilege against self-incrimination and will not be disturbed on appeal.

ON *certiorari* to review Order of *Peel, Judge*, 18 March 1974 Session of Superior Court held in PITT County.

Heard in Court of Appeals 21 October 1974.

Defendant was charged in separate bills of indictment with possession and with sale and delivery of the controlled substance 3, 4-methylenedioxamphetamine or MDA on 11 January 1974 in the parking lot of College View Apartments in Greenville. He pleaded not guilty to both charges and was tried before a jury.

The State's evidence tended to show in substance that special agent James Roland Adcock of the State Bureau of In-

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vestigation and Katina Wells, also employed by the S.B.I., were engaged in undercover work in connection with a drug investigation in Greenville. Shortly before midnight on 10 January 1974 Adcock and Miss Wells were seated in her automobile in a parking lot on Fifth Street when approached by defendant, Linwood Crandall. Defendant spoke to Miss Wells and got into the rear seat of the car. He told them he knew where they could get some MDA. He then went with them in the car directing them to the parking lot of College View Apartments. While en route defendant stated that the price would be \$35.00 per gram. Adcock gave defendant \$80.00, and defendant went into an apartment and returned with two plastic bags containing a white powder later identified as MDA which he gave to Adcock together with \$10.00 in change.

Defendant presented evidence which would tend to show that earlier in the evening of 10 January 1974 Katina Wells had asked him repeatedly to get some "stuff" for her and that as a result of these requests he took her and Adcock to where he knew he could obtain some MDA. He testified he took the money from Adcock and purchased the MDA from a James Cain and delivered it to Adcock after asking Miss Wells "whether he was cool."

The jury found defendant guilty as charged. From a judgment imposing concurrent sentences of 4 to 5 years imprisonment, defendant appealed. The appeal was not docketed in apt time, and this Court granted certiorari.

Attorney General James H. Carson, Jr., by Assistant Attorney General Rafford E. Jones, for the State.

James, Hite, Cavendish & Blount, by Marvin Blount, Jr., for defendant appellant.

BALEY, Judge.

Defendant has presented numerous assignments of error to the admission or exclusion of evidence and the conduct of the trial. All of these assignments have been carefully considered, and we find no prejudicial error.

[1] The major thrust of this appeal was directed to the defense of entrapment. Defendant sought, by cross-examination concerning prior activities of the State's witnesses while posing as members of the drug community, to demonstrate that defend-

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ant had no intent to commit the offense and was induced to do so by the conduct of law enforcement officers. The cross-examination did not bear upon the specific offense with which defendant was charged, but upon the investigative methods used by undercover agents in the detection of crime. This was neither material nor relevant to the defense in this case.

[2, 3] "The conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents. Such conduct, of course, is far different from the permissible stratagems involved in the detection and prevention of crime." *Lopez v. United States*, 373 U.S. 427, 434 (1963), *quoted in State v. Fletcher* and *State v. St. Arnold*, 279 N.C. 85, 94, 181 S.E. 2d 405, 411. The State has a right to engage in undercover work. "Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer." *Sherman v. United States*, 356 U.S. 369, 372 (1958). Entrapment involves more than affording the opportunity to commit crime; it requires inducement without which defendant would have had no criminal intent to commit the offense. *See* Annot., 33 A.L.R. 2d 883 (1954); 2 Strong, N. C. Index 2d, Criminal Law, § 7, pp. 487-88. The State's witnesses here testified that Adcock merely agreed to purchase narcotics which defendant offered to procure. Defendant claims that he obtained the narcotics at the urgent request of the State's witness. Upon conflicting testimony the case was submitted to the jury under appropriate instructions from the trial court concerning entrapment, instructions which are not challenged by defendant. The jury accepted the State's version of the facts.

[4] Defendant assigns as error the denial of his motion for preliminary hearing after indictment had been obtained. The rule as to the right of a defendant to a preliminary hearing is well stated in *State v. Foster*, 282 N.C. 189, 196, 192 S.E. 2d 320, 325:

"Neither the North Carolina nor the United States Constitution requires a preliminary hearing. A preliminary hearing is not a necessary step in the prosecution of a person accused of crime, and an accused person is not entitled to a preliminary hearing as a matter of substantive right."

See also State v. Thornton, 283 N.C. 513, 196 S.E. 2d 701; *State v. Harrington*, 283 N.C. 527, 196 S.E. 2d 742, *cert. denied*, 414 U.S. 1011 (1973). Defendant made no request for discovery and

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has shown no prejudice from the denial of his motion for a preliminary hearing.

[5] Defendant contends that the court erred in interrupting the continuity of the trial by extending the noon recess until he could conduct another previously scheduled but unrelated hearing. Defendant claims that such a break in the trial is as much a denial of the fundamental right to a speedy trial as an unwarranted delay in the commencement of a trial. We do not agree. In discharging his duty to control the conduct of the trial to prevent injustice to any party, the trial court has broad discretionary powers. Certainly the interruption of a trial for the purpose of expediting other court matters would be well within the discretion of the judge, and, absent a positive showing that defendant was prejudiced in a material way, such an interruption would not deprive defendant of his right to a speedy trial. There is no indication that defendant suffered any prejudice from the delay in resuming the trial after the noon recess.

[6] Defendant complains that the court allowed the State to use leading questions on direct examination. Permitting leading questions on direct examination is a matter within the discretion of the trial court and not reviewable on appeal, absent a showing of abuse of discretion which does not here appear. *State v. Clanton*, 278 N.C. 502, 180 S.E. 2d 5; *State v. Painter*, 265 N.C. 277, 144 S.E. 2d 6.

[7, 8] Defendant challenges the admission of exhibits and testimony identifying the white powder as MDA. Agent Adcock testified that he retained possession of the powder throughout the forty-five minute interval between the time he acquired it from defendant and the time he handed it over to the S.B.I. It was retained by the S.B.I. until presented in court. The evidence was properly admitted. Defendant further contends that the trial court violated G.S. 1-180 by finding in the presence of the jury that a witness was an expert in forensic chemistry. This is simply a ruling upon the qualifications of the witness to testify as to his opinion and is not error. *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652, *vacated and remanded on other grounds*, 409 U.S. 1004 (1972).

[9] Defendant assigns error in the State's cross-examination of a defense witness on details of prior convictions and of defendant himself on a previous prison term. Prior convictions are a proper subject for cross-examination. *State v. Miller*, 281

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N.C. 70, 187 S.E. 2d 729; *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874; 1 Stansbury, N. C. Evidence (Brandis rev.), § 112. Furthermore, defendant had already testified on direct examination that he had been in prison. He cannot have been prejudiced by the reference on cross-examination.

[10] Defendant makes several assignments of error in the court's rulings during testimony of a defense witness. The questions concerned the witness's addiction to heroin, a plea of nolo contendere to a charge of distribution of heroin, and prior dealings with Miss Wells. In excluding the testimony the court was merely protecting the witness's Fifth Amendment privilege against self-incrimination. His rulings on whether the responses would be incriminating will not be disturbed on appeal. *See generally* 1 Stansbury, *supra*, § 57.

G.S. 90-95(a) (1) under which defendant was prosecuted makes it unlawful for any person "(1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance." The indictment charged that defendant "did sell and deliver." Defendant was also charged under G.S. 90-95(a) with the possession of a controlled substance. The instruction of the court related to both offenses: possession and sell or deliver. The jury returned a verdict in both offenses "guilty as charged." Defendant received concurrent sentences of 4 to 5 years on each of the two charges. Both sentences were within statutory limits. We do not perceive how defendant could have been prejudiced since either of the offenses for which he was convicted would support the sentence imposed. There was ample evidence to find that he was guilty of both sale and delivery, but he was only sentenced as if it were a single offense.

Defendant has been accorded a vigorous defense in a fair trial free from prejudicial error.

No error.

Judges MORRIS and HEDRICK concur.

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BESS WOODARD CAMPBELL v. FIRST-CITIZENS BANK AND TRUST COMPANY, FORMERLY TRUSTEE U/W/O MOSES W. WOODARD

No. 7410SC732

(Filed 20 November 1974)

Rules of Civil Procedure § 60—judgment of dismissal stricken—no finding of extraordinary circumstances

Trial judge erred in striking out the judgment of dismissal entered against plaintiff by another superior court judge for failure of plaintiff to prosecute her action where there was no finding of any unusual or extraordinary circumstances which might explain plaintiff's failure, though the court did find that plaintiff was not represented by counsel when the action was first called for trial and dismissal was entered but she subsequently retained an attorney.

APPEAL by defendant from *McLelland, Judge*, 29 April 1974 Session of Superior Court held in WAKE County.

Heard in Court of Appeals 26 September 1974.

This action was begun on 29 October 1969 by issuance of summons with extension of time to file complaint. On 26 February 1970 the complaint was filed. In it plaintiff alleged defendant's mismanagement of a testamentary trust of which she was a beneficiary and sought an accounting plus actual and punitive damages.

On 25 January 1974, notice was mailed to interested parties of a special "clean-up" calendar the week of 18 February 1974 for cases filed before 1 January 1973. On 1 February 1974 Judge Henry A. McKinnon with plaintiff's consent signed an order relieving original counsel for plaintiff as attorneys of record.

Plaintiff's case was called for hearing on 20 February 1974, whereupon defendant moved to dismiss under Rule 41(b) of the Rules of Civil Procedure for failure to prosecute. Plaintiff was not represented by counsel at that time, but an attorney with whom she had discussed the case and whom she ultimately retained spoke in her behalf.

Judge McKinnon entered the following order of dismissal:

"This matter coming on to be heard and being heard before His Honor, Henry A. McKinnon, Senior Presiding Judge of the Superior Court of Wake County, acting under the provisions of Rule 2(g) of the General Rules of Practice for the Superior Courts, and upon the defendant's

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motion under Rule 41(b) of the Rules of Civil Procedure; and it appearing to the Court that this action was commenced by the issuance of summons on 29 October 1969 with extension of time to file complaint being granted, that complaint was filed on 26 February 1970, that answer was filed on 28 April 1970; that discovery was commenced by the plaintiff on 29 June 1972 by serving written interrogatories on the defendant; that the filing of answers to all of the plaintiff's interrogatories was completed on 13 November 1972; that the deposition of the plaintiff was taken by the defendant on 26 April 1973; that the defendant has examined certain documents of the plaintiff pursuant to defendant's motion and court order of 6 June 1973; that deposition of Thomas G. Chapman, principal witness for the defendant was taken in New Orleans, Louisiana on 26 and 27 July 1973, at which latter deposition the plaintiff was represented by her attorney; and that since the taking of said latter deposition the plaintiff has made no further efforts to prosecute her action or to prepare it for trial, now, therefore

IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED that the plaintiff's action be dismissed for failure to prosecute, and that the costs be taxed against the plaintiff but without prejudice to the right of the plaintiff, within six months of the date of this order, to commence a new action based on the same claim, on condition that the plaintiff first pay the costs of this action, and the further condition that the plaintiff permit the written interrogatories of the plaintiff to the defendant and the defendant's answers thereto previously filed in this action, the deposition of the plaintiff taken on 26 April 1973 and the deposition of Thomas Gibbs Chapman taken on 26 and 27 July 1973, transcripts of which depositions have been filed in this action, and all other matters of discovery which have been completed in this action to be used in any such new action in the same manner and to the same extent as such interrogatories, answers and depositions could have been used in this action, and neither party shall again conduct discovery as to any of said matters.

This 21 day of February 1974.

HENRY A. MCKINNON
Judge Presiding"

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On 28 March 1974 plaintiff with new counsel moved to set aside the order of dismissal. After hearing the motion on 1 May 1974 Judge D. M. McLelland entered the following order:

"THIS CAUSE COMING ON TO BE HEARD and being heard before the undersigned Judge Presiding at the April 29, 1974 Civil Session of the Superior Court Division of the General Court of Justice, Wake County, North Carolina, upon Motion of plaintiff to set aside the Judgment previously entered in this cause on February 17, 1974; and it appearing to the Court that said Judgment should be set aside and this Cause re-instated on the trial docket, ~~in the discretion of the Court~~, for the reason that plaintiff was not represented by counsel during the period February 1, 1974 to and including February 17, 1974 but made this Motion with diligence upon retaining substitute counsel, ~~and for other causes and reasons;~~

IT IS THEREFORE, ORDERED that the Judgment entered in this cause on February 17, 1974 be and the same is hereby stricken and that this cause be re-instated upon the civil issue docket of the Superior Court Division, General Court of Justice of Wake County, North Carolina for further proceedings, trial and disposition.

This the 1st day of May, 1974.

s/ D. M. MCLELLAND
Judge Presiding"

[The date 17 February 1974 should read 20 February 1974.]

From the order of Judge McLelland setting aside the judgment of dismissal, defendant appealed.

Boyce, Mitchell, Burns and Smith, by Eugene Boyce, for plaintiff appellee.

Harris, Poe, Cheshire, and Leager, by Samuel R. Leager, for defendant appellant.

BALEY, Judge.

Motions to set aside a final judgment are governed by Rule 60(b) of the North Carolina Rules of Civil Procedure which provides in pertinent part:

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"On motion and on such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

"(1) Mistake, inadvertence, surprise, or excusable neglect;

. . . .

"(6) Any other reason justifying relief from the operation of the judgment."

Our Supreme Court has stated that "[i]f a movant is uncertain whether to proceed under clause (1) or (6) of Rule 60(b) he need not specify if his 'motion is timely and the reason justifies relief.' 7 Moore's Federal Practice § 60.27(2) (2d ed. 1970)." *Brady v. Town of Chapel Hill*, 277 N.C. 720, 723, 178 S.E. 2d 446, 448. Under either clause the movant must show he has a meritorious cause of action. *Id.*; *Kirby v. Contracting Co.*, 11 N.C. App. 128, 180 S.E. 2d 407, *cert. denied*, 278 N.C. 701, 181 S.E. 2d 602.

After final judgment was entered in this case dismissing plaintiff's action, she then retained counsel who, with diligence, made a motion to set aside the judgment. The order of Judge McLelland which granted the motion and set aside the judgment was not based upon the finding of any mistake, inadvertence, surprise, or excusable neglect. The only reason assigned for his order was that plaintiff was not represented by counsel during the period 1 February 1974 to and including 17 [20] February 1974 when the case was called for hearing. It is significant that the court struck from the drafted order the words "in the discretion of the court" and "for other causes and reasons," thus relying solely upon the fact that plaintiff was not represented by counsel at the time her action was dismissed.

Plaintiff was aware of her scheduled trial and the need to obtain legal counsel in sufficient time to procure such representation. She had consented to the court order on 1 February 1974 which relieved her attorneys from their obligation to appear for her, and there is no finding that any diligent effort was made to secure other legal services. The absence of counsel for plaintiff was before the court and considered when the original judgment of dismissal was entered. Plaintiff did not appeal from that dismissal order or petition for certiorari, but chose to present to a second superior court judge upon motion to set aside the judgment the identical circumstances which re-

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sulted in the original dismissal for failure to prosecute her action. The only change was that plaintiff had now retained an attorney.

In *Bank v. Hanner*, 268 N.C. 668, 670, 151 S.E. 2d 579, 580, our court said:

“The power of one judge of the superior court is equal to and coordinate with that of another, and a judge holding a succeeding term of court has no power to review a judgment rendered at a former term on the ground that the judgment is erroneous. No appeal lies from one superior court judge to another.”

See also *State v. Jones*, 278 N.C. 259, 179 S.E. 2d 433; *State v. Kelly*, 5 N.C. App. 209, 167 S.E. 2d 881.

While Rule 60(b) (6) has been described as “a grand reservoir of equitable power to do justice in a particular case,” 7 Moore’s Federal Practice § 60.27(2), at 375 (2d ed. 1974), there is no compelling reason shown in this case for the exercise of such equitable power. There is no finding of any unusual or extraordinary circumstances which might explain plaintiff’s failure to prosecute her action. The judgment of dismissal was entered without prejudice to the right of plaintiff to institute a new action within six months under certain prescribed conditions which were not unreasonable.

The order of Judge McLelland striking out the judgment of dismissal and reinstating this cause upon the civil issue docket in the Superior Court of Wake County is reversed.

Reversed.

Judges BRITT and HEDRICK concur.

Hargett v. Air Service and Lewis v. Air Service

MARY McLEMORE HARGETT, ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. HARGETT V. GASTONIA AIR SERVICE, INC. AND COCKER MACHINE & FOUNDRY COMPANY, INC.

—AND —

MARY JANE SPIVEY LEWIS, ADMINISTRATRIX OF THE ESTATE OF WAYNE HARRISON LEWIS V. GASTONIA AIR SERVICE, INC. AND COCKER MACHINE & FOUNDRY COMPANY, INC.

No. 7420SC739

(Filed 20 November 1974)

1. Rules of Civil Procedure § 50—motion for judgment n.o.v.—standards for determining

The same standards which are applied to a motion for directed verdict are applicable to a motion for judgment notwithstanding the verdict. G.S. 1A-1, Rule 50(b)(1).

2. Rules of Civil Procedure § 50—motion for judgment n.o.v.—prior denial of directed verdict

Prior denial of a motion for directed verdict is not a bar to a motion for judgment notwithstanding the verdict.

3. Aviation § 3—arrangement of charter flight—failure to cancel—causal connection to crash

In an action to recover for the death of two passengers in the crash of a charter airplane, the evidence was insufficient to support a finding that the failure of defendant's employee who arranged the flight to cancel the flight because of bad weather had some reasonable causal connection with the crash where the evidence did not disclose what caused the accident or whether the condition of the weather and the type of aircraft chosen for the flight contributed to the fatal crash.

APPEAL by plaintiffs from *Seay, Judge*, February 1974 Session of Superior Court held in UNION County.

Heard in Court of Appeals 16 October 1974.

Plaintiffs in their administrative capacities have instituted these actions, which were consolidated for trial, to recover damages for the wrongful deaths of their intestates, William H. Hargett and Wayne Harrison Lewis. Both Hargett and Lewis were killed in the crash of an aircraft in which they were passengers which occurred near Eagle Rock, Virginia, on 14 November 1969. The airplane was owned by Gastonia Air Service, Inc. (Gastonia Air Service) and was piloted by its employee, Russell Morgan. It was en route from Gastonia and Monroe, North Carolina, to White Sulphur Springs, West Virginia, where

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Hargett and Lewis, employees of McCoy-Ellison Company, Inc. (McCoy-Ellison) and Fred Landman, an employee of Cocker Machine & Foundry Company (Cocker Foundry) had been sent by their employers to repair textile equipment at a Burlington Industries plant.

At the instruction of Cocker Foundry, its employee Landman arranged the charter flight with defendant Air Service, the cost of which was to be paid jointly by Cocker and McCoy-Ellison. The plane left Gastonia with the pilot Morgan and his passenger Landman and went to Monroe where it picked up Hargett and Lewis. The flight continued from there toward its destination until terminated by the crash into the side of Wal-low Pond mountain "about 30 yards from the top of the ridge." There were no eyewitnesses to the accident and no survivors.

The complaints alleged that the pilot Morgan and Landman, who arranged the flight, were negligent in not cancelling the flight because they were aware of reported adverse weather conditions unsuitable for VFR (visual flight rules) flights and because the aircraft involved was not equipped for IFR (instrument flight rules) flights, and that such negligence was the proximate cause of the crash and deaths of plaintiffs' intestates. There were other allegations with respect to the negligent operation of the plane in violation of Federal Aviation Administration regulations, but no evidence was submitted in support of these allegations.

At the close of plaintiffs' evidence and again at the close of all the evidence, defendant Cocker Foundry moved for a directed verdict. Both motions were denied. Issues were submitted to the jury with respect to the negligence of Morgan and the scope of his employment by Gastonia Air Service, the negligence of Landman and the scope of his employment by Cocker Machine & Foundry, and damages.

The jury answered all issues in favor of the plaintiffs and awarded \$65,000.00 damages in each case. (The maximum allowable under the controlling Virginia wrongful death statute.)

Upon return of the verdict, defendant Cocker Foundry moved for judgment notwithstanding the verdict or in the alternative for a new trial. The trial court granted the motion for judgment n.o.v. and denied the motion for a new trial. Judgment was entered awarding plaintiffs recovery from Gastonia Air Service and denying recovery from Cocker Foundry.

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From this judgment plaintiffs have appealed to this Court. Gastonia Air Service did not appeal.

Griffin and Caldwell, by Thomas J. Caldwell, for plaintiff appellant Mary Jane Spivey Lewis.

Thomas and Harrington, by Larry E. Harrington, for plaintiff appellant Mary McLemore Hargett.

Carpenter, Golding, Crews & Meekins, by James P. Crews and Rodney Dean, for defendant appellee Cocker Machine & Foundry Company, Inc.

BALEY, Judge.

The only question necessary for decision on this appeal is whether the motion of defendant Cocker Foundry for judgment notwithstanding the verdict was properly granted by the trial court.

[1, 2] The same standards which are applied to a motion for directed verdict are applicable to a motion for judgment notwithstanding the verdict. N.C.R. Civ. P. 50(b) (1). Prior denial of a motion for directed verdict is not a bar to the motion for judgment notwithstanding the verdict. *Investment Properties v. Allen*, 281 N.C. 174, 188 S.E. 2d 441. On a motion for directed verdict by the defendant the court must consider the evidence in the light most favorable to the plaintiffs and may grant such motion only if, as a matter of law, the evidence is insufficient to support a verdict for plaintiffs. *Investment Properties v. Allen, supra*; *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47. Using this yardstick in evaluating the evidence for plaintiffs, we conclude that the order granting judgment for defendant Cocker Foundry notwithstanding the verdict is correct and must be affirmed.

The evidence when considered in its most favorable light for plaintiffs shows that Landman, who arranged the charter flight with Gastonia Air Service, had some prior flight instruction and in this case had obtained information from the air weather service that "the weather was not forecasted to be suitable for VFR flight in the vicinity of his destination." The pilot Morgan was made aware of this weather information and prior to departure had secured much more detailed information from the weather service. Landman knew that the aircraft chosen for the flight was usually flown VFR but was actually

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equipped for flying under both visual flight rules (VFR) and instrument flight rules (IFR). The pilot Morgan was a commercial pilot with an instrument rating which qualified him to fly both VFR and IFR. During the flight Morgan obtained additional weather information from Raleigh and Roanoke flight service stations covering the weather conditions at his destination at White Sulphur Springs. There is testimony concerning fog and heavy moisture in the mountain area about the time of the crash, but no witnesses saw the immediate area when the crash occurred. There is no direct evidence that the plane was in clouds, fog, or any precipitation or that such weather conditions caused the crash. One witness testified that he heard the plane before the crash, and the engine cut off just a few seconds before it hit. The investigation by the Federal Aviation Administration revealed no cause for the accident.

[3] In order to recover from the defendant in this action the plaintiffs must show negligence on the part of Landman which was a proximate cause of the death of their intestates. The evidence does not disclose what caused the accident which resulted in their deaths. In the light of an omniscient hindsight, this flight should not have been undertaken as there was a crash in which all occupants of the plane were killed. But whether the condition of the weather and the type of aircraft chosen for the flight contributed to the fatal crash is left to conjecture. Pilot error in the operation of the aircraft, mechanical defects, engine malfunction, or other reasons which lie in the realm of speculation can be projected as possible causes, but, absent some evidence which would support a finding that the conduct of Landman in failing to cancel the flight had some reasonable causal connection with the crash, the plaintiffs have not shown actionable negligence on the part of Landman or Cocker Foundry.

“Any recovery for wrongful death must be based on actionable negligence under the general rules of tort liability. ‘In a case involving an airplane crash the doctrine of *res ipsa loquitur* does not apply, “it being common knowledge that airplanes do fall without fault of the pilot.” Furthermore, there must be a causal connection between the negligence complained of and the injury inflicted.’ *Jackson v. Stancil*, 253 N.C. 291, 116 S.E. 2d 817; *Bruce v. Flying Service*, 231 N.C. 181, 56 S.E. 2d 560; *Smith v. Whitley*, 223 N.C. 534, 27 S.E. 2d 442.”

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Mann v. Henderson, 261 N.C. 338, 341, 134 S.E. 2d 626, 629.

The judgment of the trial court is affirmed.

Affirmed.

Judges MORRIS and HEDRICK concur.

MARY ALICE KING LEE AND HUSBAND, CHARLIE LEE; IRENE KING BROADNAX AND HUSBAND, ROBERT BROADNAX; FRANCES KING GALLOWAY AND HUSBAND, JOHN GALLOWAY; BESSIE KING GALLOWAY AND HUSBAND, FRANK GALLOWAY; JESSIE KING LAWSON AND HUSBAND, LINDSAY LAWSON; PRICIE KING HARRIS, WIDOW; DAISY KING TOTTEN AND HUSBAND, JAMES TOTTEN; GEORGE KING AND WIFE, FRANCES G. KING; JIMMIE A. KING AND WIFE, JUANITA SELLARS KING, AND HENRY KING, WIDOWER, PETITIONERS

— v. —

WILLIE ALBERT KING AND WIFE, DOROTHY LAWSON KING; ROBERT I. KING AND WIFE, CALLIE HOOPER KING; ALLEN H. GWYN, JR. AND WIFE, EVELYN W. GWYN; JULIUS J. GWYN AND WIFE, PATRICIA W. GWYN, AND MELZER A. MORGAN, JR., AND WIFE, MOLLY D. MORGAN, RESPONDENTS

No. 7417SC761

(Filed 20 November 1974)

Judgments § 37; Rules of Civil Procedure § 41—voluntary dismissal without prejudice—failure to meet conditions—judgment is *res judicata*

Where the Supreme Court ruled that petitioners failed to carry their burden of proof of title in a partitioning proceeding which was converted into an action to try title and that the motion of the answering respondents for directed verdict should be allowed unless the superior court allows a motion for voluntary dismissal without prejudice, the superior court upon remand allowed petitioners' motion for voluntary dismissal without prejudice upon the conditions that petitioners pay costs and \$1,000 attorneys' fees for the respondent who claimed title and that a new partitioning proceeding be instituted by a certain date, and the costs and attorneys' fees were not paid and a new proceeding was not instituted by the date specified, the adjudication that respondents' motion for directed verdict should have been granted in the former proceeding is *res judicata* in a new partitioning proceeding involving the same parties and land.

APPEAL by petitioners from *Rousseau, Judge*, May 1974
Civil Session of Superior Court held in ROCKINGHAM County.

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This special proceeding was instituted by petitioners for purpose of having a 100-acre tract of land sold for partition. In their petition, petitioners alleged that certain of them, together with certain of respondents, own the land as tenants in common; that Albert King died intestate on 15 January 1968 seized and possessed of said land; that intestate left surviving him seven daughters and six sons; that except for respondent Willie Albert King and David King, each of said survivors owns 1/13th interest in said land; that respondent Willie Albert King had acquired the interest of David King; that thereafter respondent Willie Albert King and wife conveyed their 2/13ths interest, excepting their life estates, to respondents Gwyn and Morgan.

Respondents, with exception of Robert I. King and wife, filed answer denying that petitioners own any interest in the 100-acre tract of land. As a further defense, they pleaded a former special proceeding in which respondent Callie Hooper King, individually and as administratrix of the estate of Albert King, and her husband, respondent Robert I. King, were petitioners, and all of the petitioners herein, together with respondents Willie Albert King and wife, were respondents. The record and proceedings in the former cause are summarized in pertinent part as follows:

1. In the petition, filed 22 April 1969, petitioners alleged that Albert King died intestate on 15 January 1968 and Callie H. King qualified as administratrix of his estate; that intestate, at the time of his death, owned three tracts of land (including the 100-acre tract involved here and referred to in the former petition as Tract #3); that Albert King left 13 children surviving him; that petitioner Robert I. King, a son, and the other 12 children, named as respondents, each owned 1/13th interest in the three tracts of land; and that petitioners were entitled to have said lands sold for partition.

2. Willie Albert King and wife filed answer to the petition in which answer he pleaded sole seizin as to Tract #3. No other respondent filed answer to the petition.

3. The cause was transferred to the civil issue docket for trial of the issue raised as to Tract #3. Following a trial, the superior court allowed petitioners' motion for directed verdict and entered judgment declaring the 13 children of Albert King owners as tenants in common of the 100 acres in question. Willie Albert King and wife appealed to the Court of Appeals.

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4. By opinion reported in 9 N.C. App. 369, 176 S.E. 2d 394 (1970), this court held that petitioners failed to prove title to Tract #3, that the motion of Willie Albert King and wife for directed verdict should have been allowed, and that the superior court erred in entering its judgment.

5. The Supreme Court granted certiorari to review the decision of this court and its opinion is reported in 279 N.C. 100, 181 S.E. 2d 400 (1971). The Supreme Court agreed with the Court of Appeals that petitioners failed to prove title to Tract #3 and ordered that the judgment of the superior court be vacated. However, the Supreme Court went further and provided (page 107) : “. . . The decision of the Court of Appeals is modified so as to permit petitioners to move for a voluntary dismissal *without prejudice* prior to granting the motion of the answering defendants for a directed verdict against petitioners and the entry of a judgment adverse to petitioners. If the court, in the exercise of its discretion, grants petitioners’ motion for a voluntary dismissal, it will enter an order to that effect upon such terms and conditions as justice requires. If the court, in the exercise of its discretion, denies petitioners’ motion for a voluntary dismissal, it will enter a judgment adverse to petitioners.”

6. After the cause was remanded to the superior court pursuant to the Supreme Court opinion, and following a hearing, Judge Exum entered a judgment in which he opined that the ends of justice required that petitioners be granted a voluntary dismissal without prejudice respecting their claim for the right to partition Tract #3; he granted their motion for dismissal “. . . without prejudice of that portion of this cause by which (petitioners) demand partition of . . . Tract #3,” but on the following conditions: (1) that they pay the costs of the action and \$1,000 fees for Willie Albert King’s attorneys; (2) that a new action or proceeding for the partition of Tract #3 be instituted on or before 15 March 1972 “but not thereafter.”

7. The costs and attorney fees referred to in Judge Exum’s judgment have not been paid.

* * * * *

This new proceeding was instituted on 14 September 1973. On 26 February 1974, respondents, pursuant to G.S. 1A-1, Rules 12(c) and 56, moved for judgment on the pleadings, or in the alternative, summary judgment. Petitioners also moved for sum-

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mary judgment. Following a hearing at which pleadings, affidavits, depositions and other materials were presented, the court entered judgment making findings of fact and conclusions of law and allowing respondents' motion for summary judgment. Petitioners appealed.

Griffin, Post & Deaton, by W. Edward Deaton, Richard A. Cresenzo, and Peter M. McHugh, for the petitioner appellants.

Gwyn, Gwyn & Morgan, by Julius J. Gwyn, for the respondent appellees.

BRITT, Judge.

The sole question before us is whether the motion for summary judgment was properly granted. In ruling on a motion for summary judgment, the court does not resolve issues of fact and must deny the motion if there is a genuine issue of material fact. The motion may be granted only where there is no such issue and the moving party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56; *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

Although the trial judge made detailed findings of fact and conclusions of law, this is not required under Rule 56. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972). The findings of fact and conclusions of law have no effect on this appeal and are irrelevant to our decision. Consequently, the only assignment of error we consider is that relating to the entry of judgment in favor of respondents.

Respondents contend that inasmuch as the conditions set forth by Judge Exum for reinstitution of a partition proceeding regarding Tract #3 were not complied with, the adjudications that Willie Albert King's motion for directed verdict should have been granted in the former proceeding were *res judicata* as to this proceeding. We agree.

It is well settled that a final judgment, rendered on the merits, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and privies, in all other actions involving the same matter. *Masters v. Dunsatan*, 256 N.C. 520, 124 S.E. 2d 574 (1962); *Bryant v. Shields*, 220 N.C. 628, 18 S.E. 2d 157 (1942).

Each of the petitioners and respondents, or his privy, in this proceeding was a party in the former proceeding. The fact

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that petitioners in this proceeding were respondents in the former proceeding, and that certain of respondents here were petitioners there, makes no difference on the question of *res judicata*. *Peake v. Babson*, 11 N.C. App. 413, 181 S.E. 2d 259 (1971). They were all *parties*. The interests of petitioners and respondents in the former proceeding, except for Willie Albert King and wife, were the same and the issue of title to Tract #3 was squarely presented. There is no doubt that the superior court and, in turn, this court and the Supreme Court had jurisdiction. The adjudication by the Court of Appeals that Willie Albert King and wife were entitled to a directed verdict on the claim that all 13 children of Albert King owned Tract #3 was affirmed by the Supreme Court. The Supreme Court provided the only way for the children of Albert King, other than Willie Albert, to assert again their claim to an interest in the land in question. We quote from the opinion (page 106) :

“Under Rule 41(a) (2), at the instance of the plaintiff, the court may permit a *voluntary dismissal* upon such terms and conditions as justice requires. (Citations.) In contrast to the former practice, (citation) a dismissal without prejudice is permissible under Rule 41(a) (2) only when so ordered by the court, in the exercise of its judicial discretion, upon finding that justice so requires. (Citation.)”

When the former proceeding was remanded to the superior court, the petitioners moved for a voluntary dismissal. To allow the motion was addressed to the sole discretion of the superior court judge, and if he allowed it, he had the authority to impose” . . . such terms and conditions as justice requires.” In allowing the motion, Judge Exum imposed two conditions, the meeting of which were a prerequisite to a reinstitution of the proceeding as to Tract #3. Those conditions were not complied with, therefore, respondents are entitled to a dismissal of this proceeding.

The judgment of the superior court allowing respondents' motion for summary judgment is

Affirmed.

Judges CAMPBELL and VAUGHN concur.

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C. W. CAPE, EMPLOYEE-PLAINTIFF v. WNC PALLET & FOREST PRODUCTS COMPANY (SELF-INSURED), EMPLOYER-DEFENDANT

No. 7430IC783

(Filed 20 November 1974)

1. Master and Servant § 94—workmen's compensation—failure of Industrial Commission to make findings

Industrial Commission's conclusion that plaintiff was entitled to additional compensation for temporary total disability was erroneous where the Commission failed to make any findings of fact regarding plaintiff's disability during the period in question.

2. Master and Servant § 77—workmen's compensation—refusal of employee to submit to physical exam—suspension of compensation

Evidence presented to the Industrial Commission and findings made by the Commission lacked the specificity necessary for the court to determine whether plaintiff's right to compensation was suspended by his refusal to undergo a myelographic diagnostic examination. G.S. 97-27.

APPEAL by defendant from an opinion and award of the Industrial Commission (Commission) filed on 30 April 1974. Heard in the Court of Appeals on 23 October 1974.

This is a proceeding under the Workmen's Compensation Act wherein the plaintiff, C. W. Cape, seeks compensation from the defendant, WNC Pallet & Forest Products Company, for injuries sustained by accident on 5 July 1971 arising out of and in the course of his employment with the defendant.

In August of 1971, the defendant admitted its liability and agreed to pay plaintiff compensation for temporary total disability. (This agreement between the parties for the payment of temporary total disability was not made a part of the record on appeal.) The defendant suspended payment of compensation to the plaintiff on 22 February 1972 when it allegedly received information that the plaintiff had refused to undergo a myelographic diagnostic examination. Subsequent thereto, the plaintiff requested a hearing before the Industrial Commission, which was held at Robbinsville, N. C., on 16 April 1973 before Deputy Commissioner Delbridge.

The only evidence offered at the hearing was the testimony of the plaintiff, which tended to show the following:

Several days after the accident, plaintiff went to the hospital and was treated by Dr. Charles Van Gorder of Andrews,

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N. C. He continued to see Dr. Van Gorder; and in December of 1971, Dr. Van Gorder suggested that the plaintiff see Dr. Watts, a specialist, in Asheville. Dr. Watts hospitalized the plaintiff on 7 February 1972, and the plaintiff remained in the hospital for approximately ten days. While in the hospital, plaintiff received information that the Highway Commission planned to take part of his property by eminent domain. Consequently, he and Dr. Watts agreed that it would be best for the plaintiff to go home and take care of his personal affairs before undergoing further treatment. On the day he left the hospital, Dr. Watts told the plaintiff that he would probably need to have an operation on his spine and that it would be necessary for the plaintiff to have a myelogram in order to locate the portion of his spine that would need surgery. While in the hospital, plaintiff also discussed having a myelogram with Dr. Ledbetter, a neurosurgeon. After the plaintiff left the hospital, he continued to be treated by Dr. Watts and Dr. Van Gorder. On 3 July 1972, the plaintiff was also examined by Dr. Richard Weiss, a neurosurgeon, in Asheville. Upon the suggestion of the Commission, the plaintiff was examined again by Dr. Weiss on 6 March 1973.

At the hearing, the plaintiff did not offer the expert medical testimony of any of his doctors. He testified that he was instructed by the Commission to bring to the hearing letters from his doctors rather than have the doctors testify in person. At least one letter, written by Dr. Van Gorder, was in the possession of the plaintiff at the hearing; and the plaintiff testified that Dr. Weiss had mailed a medical report to the Commission.

At the conclusion of the hearing, the proceeding was reset before Deputy Commissioner Leake for the "purpose of taking such medical evidence as either party desired to offer." However, at the second hearing on 23 October 1973, neither party offered into evidence any medical testimony. Rather, the plaintiff again stated that he had been instructed by the Commission to get medical evidence from his doctors in the form of letters and that he had done so. He stated that he had with him letters from Dr. Weiss and Dr. Van Gorder and that a report (apparently from Dr. Weiss) had been sent to the Commission in Raleigh. He also referred to the existence of a letter concerning Dr. Weiss that he had received from the defendant's attorney. (None of the letters or reports referred to by plaintiff at the two hearings was made a part of the record on appeal.)

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Deputy Commissioner Leake, by order filed 6 November 1973, referred the case back to Deputy Commissioner Delbridge, who on 14 December 1973 filed his opinion and award in this proceeding. In his opinion and award, Deputy Commissioner Delbridge made the following pertinent findings of fact:

"Plaintiff was first seen and treated by Dr. Van Gorder of Andrews, North Carolina, on July 26, 1971. Plaintiff continued under the treatment of Dr. Van Gorder and was later referred to physicians in Asheville, North Carolina. He was hospitalized on February 7, 1972, in Asheville and was seen by Dr. Watts, Dr. Galloway, Dr. Ledbetter and Dr. Weiss. He remained in the hospital ten days and then left to go to his home as the State Highway Commission had issued condemnation proceedings against his property. Plaintiff was subsequently seen by Dr. Weiss of Asheville on July 3, 1972. Dr. Weiss and Dr. Ledbetter recommended a myelogram to determine if plaintiff's condition was being caused by a ruptured disc in the back. Plaintiff refused to have a myelogram carried out."

"Subsequent to the hearing held in Robbinsville, North Carolina, on April 16, 1973, the attorney for the defendant arranged an appointment with Dr. Richard E. Weiss of Asheville, North Carolina, to see and examine and treat the plaintiff in order to determine his medical problems. Such appointment being made for June 8, 1973. Plaintiff did not keep this appointment. Subsequent appointments were made, but the plaintiff failed to keep the appointments. Plaintiff refuses to submit to further examination and treatment offered by the defendant."

From the conclusion of Deputy Commissioner Delbridge that the plaintiff was entitled to additional compensation for temporary total disability from the latter part of February 1972 until 8 June 1973, the defendant appealed to the Full Commission. On 30 April 1974 the Full Commission affirmed and adopted as its own the opinion and award of Deputy Commissioner Delbridge. Defendant appealed.

Hedrick, McKnight, Parham, Helms, Kellam & Feerick by Richard T. Feerick for defendant appellant.

No counsel contra.

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HEDRICK, Judge.

This appeal presents the question of whether the facts found support the conclusion that the "[p]laintiff is entitled to additional compensation for Temporary Total Disability from the last payment of compensation to him in the latter part of February 1972, to June 8, 1973, at the rate of \$56.00 per week for such period."

G.S. 97-29, in pertinent part, provides: "[W]here the incapacity for work resulting from the injury is total, the employer shall pay or cause to be paid . . . to the injured employee *during such total disability* a weekly compensation. . . ." [Emphasis ours.]

G.S. 97-83, in pertinent part, provides:

"If the employer and the injured employee or his dependents fail to reach an agreement, in regard to compensation under this Article within 14 days after the employee has knowledge of the injury or death, or if they have reached such an agreement which has been signed and filed with the Commission, and compensation has been paid or is due in accordance therewith, and the parties thereto then disagree as to the continuance of any weekly payment under such agreement, either party may make application to the Industrial Commission for a hearing in regard to the matters at issue, and for a ruling thereon."

[1] The stipulation entered into by the parties at the hearing conclusively established that the injury suffered by the plaintiff on 5 July 1971 was compensable; and the agreement entered into between the parties in August of 1971 established the defendant's liability to pay weekly compensation to the plaintiff for temporary total disability. However, when the defendant stopped making the payments for temporary total disability on 22 February 1972 and the plaintiff requested a hearing, the issue was raised as to whether the plaintiff was still disabled within the meaning of the Workmen's Compensation Act. While there is some evidence in the record that would support a finding that the plaintiff was disabled from 22 February 1972 until 8 June 1973, the Commission failed to make any findings of fact regarding plaintiff's disability during this period of time. Thus, the Commission's conclusion that the plaintiff is entitled to additional compensation for temporary total disability is erroneous.

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[2] Additionally, defendant contends that the finding made by the Commission that “[p]laintiff refused to have a myelogram carried out” precludes a conclusion that plaintiff is entitled to additional compensation. G.S. 97-27, in pertinent part, provides:

“After an injury, and so long as he claims compensation, the employee, if so requested by his employer or ordered by the Industrial Commission, shall . . . submit himself to examination, at reasonable times and places, by a duly qualified physician or surgeon designated and paid by the employer or the Industrial Commission. * * * If the employee refuses to submit himself to or in any way obstructs such examination requested by and provided for by the employer, his right to compensation and his right to take or prosecute any proceedings under this Article shall be suspended until such refusal or objection ceases, and no compensation shall at any time be payable for the period of obstruction, unless in the opinion of the Industrial Commission the circumstances justify the refusal or obstruction.”

The evidence contains many references to numerous letters and reports which we assume relate to the question of whether the plaintiff's right to compensation was suspended pursuant to G.S. 97-27, but these letters and reports were not made a part of the record on appeal. With respect to this matter, the record is skimpy, the evidence is confused, and the findings made by the Commission lack the necessary specificity to determine this critical issue.

Upon remand, the Commission must make findings of fact sufficient to determine (1) whether the plaintiff was disabled within the meaning of the Workmen's Compensation Act from 22 February 1972 until 8 June 1973; (2) whether the plaintiff's right to claim such compensation was suspended because he refused to submit himself to a myelographic examination requested by the defendant or ordered by the Commission; or (3) if he did refuse, whether such refusal was justified under the circumstances.

Vacated and remanded.

Judges BRITT and MORRIS concur.

Sharpley v. Board of Elections

GEORGE J. SHARPLEY v. STATE BOARD OF ELECTIONS; JERRY S. ALVIS, CHAIRMAN; JAMES R. VOSBURGH; WILLIAM J. WAGONER; L. H. JONES; AND LEE C. SMITH, MEMBERS

No. 7410SC701

(Filed 20 November 1974)

1. Elections §§ 3, 7—protest not timely—action by State Board proper

The State Board of Elections may in its discretion consider and act upon a protest, even though such protest may not have been filed within the time period prescribed by the Board's own rules; moreover, the Board in appropriate circumstances may take action on its own motion even in the absence of any protest. G.S. 163-22(c), (d).

2. Elections §§ 3, 10—new election of five town commissioners—authority of State Board to order

Under G.S. 163-22.1 the State Board of Elections had the authority to order a new election for the five offices of town commissioner of Kill Devil Hills without at the same time ordering a new election for the offices of mayor and treasurer; furthermore, under that authority the Board was authorized to determine that the voting irregularity affecting one of the multiple elective offices for town commissioner substantially affected all five offices, and the Board could order a new election as to all five.

APPEAL by plaintiff from *McLelland, Judge*, 29 April 1974 Civil Session of Superior Court held in WAKE County.

Following a protest filed on 16 November 1973 with the Dare County Board of Elections concerning the 6 November 1973 general municipal election for the Town of Kill Devil Hills, the State Board of Elections, at the conclusion of a public hearing held in the Town on 18 December 1973, ordered a new election of Town Commissioners. On 17 January 1974 plaintiff brought this action to contest that order by filing complaint in the Superior Court in Wake County alleging that the State Board's decision was contrary to law and praying for an order directing that a letter of certification be issued to plaintiff as an elected Commissioner. Defendants answered, praying that the proceedings and order of the State Board be affirmed.

By order dated 4 February 1974 the new election was stayed pending the outcome of the hearing of this case. The action was heard before Judge McLelland at the 29 April 1974 Session of Superior Court, and by judgment of the same date Judge McLelland affirmed the decision of the State Board. From this judgment plaintiff appealed, and by order dated 24 May 1974 the new election was stayed pending outcome of the appeal.

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G. Irvin Aldridge; and Twiford, Abbott & Seawell by Christopher L. Seawell for plaintiff appellant.

Attorney General Carson by Associate Attorney James Wallace, Jr., for defendant appellees.

PARKER, Judge.

Plaintiff's sole assignment of error is to the signing and entry of the judgment. Thus, the facts found are binding upon this Court, and the only question presented is whether error of law appears on the face of the record. *Hall v. Board of Elections*, 280 N.C. 600, 187 S.E. 2d 52 (1972). On this appeal no question is raised as to the fairness or intent of the State Board of Elections, and in his brief plaintiff concedes that the Board acted in good faith.

[1] Plaintiff first contends that the protest in this case was not filed within the time period prescribed by the rules adopted by the State Board and that the Board lacked power to suspend its rules so as to permit it to consider the protest. In this connection, G.S. 163-22, the same section of the General Statutes which gives the State Board "authority to make such reasonable rules and regulations with respect to the conduct of primaries and elections as it may deem advisable" so long as they do not conflict with any provisions of G.S. Chap. 163, also expressly directs that the Board "shall investigate when necessary or advisable, the administration of election laws, frauds and irregularities in elections in any county and municipality and special district. . . ." G.S. 163-22(d). In our opinion, and we so hold, the authority of the State Board to conduct the investigation and to enter the order in this case was not dependent upon the filing of a timely protest. The mandatory tone of the statute which directs that the Board "shall investigate when necessary or advisable . . . frauds and irregularities in elections," makes clear that the Board in appropriate circumstances may take action on its own motion even in the absence of any protest. *A fortiori* the Board may in its discretion consider and act upon a protest, even though such protest may not have been filed within the time period prescribed by the Board's own rules. By adopting those rules the Board did not, and could not, inhibit or curtail the performance by it of duties otherwise expressly imposed upon it by statute. That this is so is further borne out by the directive in G.S. 163-22(c) that the State Board "shall compel observance of the requirements of the election laws by

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county and municipal boards of elections and other election officers," and that "[i]n performing these duties, the Board *shall* have the right to hear and act on complaints arising by petition or otherwise. . . ." (Emphasis added.)

[2] The principal question raised by this appeal is presented by plaintiff's contention that the State Board lacked power to order a new election limited to the offices of Town Commissioners without also ordering a new election for all other Town Offices. At the 6 November 1973 election the voters of Kill Devil Hills were called upon to elect a Mayor, a Treasurer, and five Town Commissioners. In its order the State Board found that there were two candidates for Mayor, one of whom received 159 votes and the other 122 votes; that there was one unopposed candidate for Treasurer who received 231 votes; that there were sixteen candidates for the five offices as Town Commissioners, all of whom ran on an at-large basis, and that the votes received by these candidates in descending order were 131, 128, 126, 121, 115, 115, 115, 98, 94, 71, 70, 65, 40, 35, 34 and 15. The Board also found that "there did exist a general confusion on the part of the electorate in the locale of Kill Devil Hills as to its rights of registration and vote [sic]," and made detailed factual findings from which it concluded that it could not determine upon the evidence before it that more than three unlawful votes or less than two unlawful votes were cast. The Board concluded that the unlawful votes, whether two or three, could not possibly have affected the outcome of the election for the office of Mayor or the office of Treasurer, and did not order a new election for those offices. However, the State Board concluded that the unlawful votes "could have substantially affected the outcome of the election of Town Commissioners," and by the unanimous vote of all five members the State Board ordered a new election for the five offices of Town Commissioner.

We hold that in entering this order the State Board acted within its lawful authority. G.S. 163-22.1, which was enacted by Sec. 5 of Chap. 793 of the 1973 Session Laws and which became effective 1 July 1973, is as follows:

"§ 163-22.1. Power of State Board to order new elections.—If the State Board of Elections, acting upon the agreement of at least four of its members, and after holding public hearings on election contests, alleged election irregularities or fraud, or violations of election laws, determines that a new primary, general or special election

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should be held, the Board may order that a new primary, general or special election be held, either statewide, or in any counties, electoral districts, or municipalities over whose elections it has jurisdiction.

“Any new primary, general or special election so ordered shall be conducted under applicable constitutional and statutory authority and shall be supervised by the State Board of Elections and conducted by the appropriate elections officials.

“The State Board of Elections has authority to adopt rules and regulations and to issue orders to carry out its authority under this section.”

In our opinion, and we so hold, under G.S. 163-22.1 the State Board had the authority to order a new election for the five offices of Town Commissioner of Kill Devil Hills without at the same time ordering a new election for the offices of Mayor and Treasurer.

We further hold the trial court was correct in concluding that “under the authority conferred by Section 163-22.1 of the General Statutes the Board was authorized to determine, as it did, that the irregularity affecting one of the multiple elective offices for Town Commissioner of Kill Devil Hills substantially affected all, and that the Board was authorized to order, as it did, a new election as to all of such multiple offices.”

The judgment of the Superior Court affirming the decision of the North Carolina State Board of Elections is

Affirmed.

Judges CAMPBELL and VAUGHN concur.

Walker v. Weaver

DAVID A. WALKER AND WIFE, PATSY B. WALKER v. EDWARD WEAVER, D/B/A WEAVER REALTY COMPANY, BEN F. MUSSER AND WIFE, HATTIE L. MUSSER

No. 745DC118

(Filed 20 November 1974)

1. Vendor and Purchaser § 8— part payment — failure to perform contract — no refund

Where a party agrees to purchase real estate and pays a part of the consideration therefor and then refuses or becomes unable to comply with the terms of his contract, he is not entitled to recover the amount theretofore paid pursuant to its terms; therefore, the trial court properly dismissed plaintiffs' action to recover \$500 paid on the purchase price of a house where plaintiffs agreed to purchase subject to their getting financing, plaintiffs' loan application was approved subject only to a title check, but after the date plaintiffs learned of the loan approval and before closing, plaintiffs decided not to purchase.

2. Vendor and Purchaser § 2— closing within thirty days — time not of essence

Time was not of the essence in a contract to purchase real estate where the contract provided that it was "to be definitely closed within a period of 30 days," since that statement did not indicate any intention of the contracting parties that all rights and obligations were to terminate if, through no fault of either vendors or vendees, the sale could not be closed exactly within the time period prescribed.

APPEAL by plaintiffs from *Barefoot, District Judge*, 20 August 1973 Session of District Court held in NEW HANOVER County.

Civil action to recover \$500.00 down payment made under a contract to purchase real property. By written agreement dated 14 June 1972 plaintiffs agreed to purchase and defendants Musser and wife agreed to sell a house and lot in Wilmington, N. C., for the price of \$22,500.00, of which \$2,500.00 was to be cash and "[b]alance together with interest at 8% per annum payable in 24 years." The agreement was also signed by Weaver Realty Company, Agent, and contained a recital that the agent acknowledged receipt of \$500.00 "as part payment on the purchase price." No further mention of this \$500.00 payment was made in the agreement. The agreement provided it was "subject to the buyers getting financing," and that the contract of sale was "to be definitely closed within a period of - 30 - days from date hereof."

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Plaintiffs commenced this action on 20 December 1972, alleging that plaintiffs, "through no fault or negligence of their own, were unable to obtain financing in accordance with the terms of the contract as herein alleged on or before the definite date set for closing therein by the defendants and in accordance with the terms of said contract it became null and void and of no binding effect on the plaintiffs upon such occurrence." On 29 December 1972 defendant Edward Weaver, doing business as Weaver Realty Company, paid the \$500.00 into the office of the clerk of superior court to be held by the clerk pending the outcome of this action, and subsequently the court entered an order dismissing this action as to Weaver Realty Company. No appeal was taken from that order. Defendants Musser filed answer in which they denied the above-quoted allegation in the complaint, and alleged that "the plaintiffs breached their agreement with these defendants and are not entitled to a refund of the \$500.00 earnest money," but that on the contrary defendants were entitled to recover the same from the clerk of superior court.

By agreement, the case was heard by the district judge without a jury. Plaintiff David A. Walker testified that on 15 June 1972, the day following the signing of the contract, plaintiffs applied for a loan to Cooperative Savings & Loan Association, that he was subsequently informed that the loan applied for was approved, but that when he contacted the Savings & Loan Association on 13 July to find out what time closing would be, he was informed that the loan papers had been misplaced, that the attorneys had not yet examined the title, and that closing could not take place until the latter part of the following week. Plaintiffs also presented the testimony of the lending officer of the Savings & Loan Association, who testified that plaintiffs' loan application had been approved subject only to a title check, that on 14 July the money was available from the Savings & Loan Association but they could not close the loan because they did not know the condition of the title, that the papers were not sent to the title attorneys until 14 July, and that he could not explain why the papers had not been sent to the attorneys before that date.

On cross-examination, plaintiff David A. Walker testified:

"In my conversation with Mrs. Brown [of Weaver Realty Company] on July 14, I did not tell her that we were not going to close when Cooperative Savings & Loan

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had that title prepared. The first time I told anybody 'No' was the following Monday, July 17. I first called Weaver Realty Company but Mr. Weaver was not in. During the weekend, my wife and I had gone by the house and we just decided that maybe it wasn't as good an idea as we first thought and we decided against buying the house during the weekend. It is true that that's when it first came to my mind, after the time when the Savings & Loan said they had approved my loan but they had to get the title complete. It is correct that prior to this time I had not shown any disappointment in the home."

At conclusion of plaintiffs' evidence, the court allowed defendants' motion for dismissal of plaintiffs' action made under Rule 41(b) and entered judgment making detailed findings of fact, conclusions of law, and directing that the \$500.00 be paid by the clerk of superior court to defendants Musser. From this judgment, plaintiffs appealed.

Poisson, Barnhill, Butler & Martin by Algernon L. Butler, Jr., for plaintiff appellants.

James L. Nelson and James D. Smith for defendant appellees.

PARKER, Judge.

[1] "It is settled law that where a party agrees to purchase real estate and pays a part of the consideration therefor and then refuses or becomes unable to comply with the terms of his contract, he is not entitled to recover the amount theretofore paid pursuant to its terms." *Scott v. Foppe*, 247 N.C. 67, 70, 100 S.E. 2d 238, 240 (1957). Such is the rule recognized in this and in a majority of American jurisdictions. Annot., 31 A.L.R. 2d 8. As is noted in that Annotation, p. 19, because application of this rule may at times produce a harsh result, a minority of jurisdictions refuses to permit the vendor to retain money paid on the contract in excess of damage sustained from the breach. We need not, however, now consider the merits of the minority view, since application of the "settled law" to the present litigation produces no harsh result.

[2] Applying the settled law, the judgment appealed from should be affirmed. Appellants' assignments of error to certain of the court's findings of fact and conclusions of law either call into question certain minor discrepancies as to dates, which we

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find immaterial, or are predicated upon appellants' contention that time was of the essence of the contract and, the loan proceeds being unavailable within the time set for closing, plaintiffs were excused from all further obligation to perform. We do not think that time was of the essence of the contract. The written agreement was apparently prepared in the office of the real estate agency and was somewhat ineptly drawn. The only reference to time of closing was the statement that the contract was "to be definitely closed within a period of 30 days," a statement which in our opinion falls short of indicating any intention of the contracting parties that all rights and obligations were to terminate if, through no fault of either vendors or vendees, the sale could not be closed exactly within the time period prescribed. Nothing in plaintiffs' evidence indicates that when the contract was drawn the time of closing was of major concern. Plaintiff David A. Walker testified, "I did not have anything to do with setting the 30 days, it was typed in."

We find the court's essential findings of fact to be supported by competent evidence and that these in turn support its conclusion of law that plaintiffs' failure to close amounted to a breach of contract. This conclusion of law was in itself sufficient to support the judgment rendered. Holding as we do, that time was not of the essence of the contract, the court's additional conclusion that "the conduct of the parties amounted to a modification of the contract to extend closing for a reasonable period of time," was merely surplusage, and we need not determine whether it was correct.

The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge BAILEY concur.

JAMES W. DAVIS v. JACK D. SMITH

No. 7426SC602

(Filed 20 November 1974)

Venue § 5—specific performance of contract to sell stock—no removal to county where certificates located

An action for specific performance of a contract to sell plaintiff certain corporate stock was not removable as a matter of right under

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G.S. 1-76(4) to the county where the stock certificates are actually located, since the primary relief sought is specific performance of contract rights and recovery of the stock certificates is only incidental to that relief.

APPEAL by defendant from *Copeland, Judge*, 13 May 1974 Session of Superior Court held in MECKLENBURG County. Argued before the Court of Appeals 15 October 1974.

On 24 April 1974 the plaintiff commenced this action seeking specific performance of an agreement of 18 May 1971 which obligated the defendant to sell to the plaintiff his stock in Cloverdale Ford, Inc., if the defendant were discharged for unsatisfactory performance of his duties as president and general manager of the corporation. The plaintiff also prayed that a preliminary injunction be issued by the court, pending a final hearing, restraining the defendant from selling, encumbering, or otherwise transferring or disposing of the stock. The plaintiff is the owner of 20.5 percent of the issued and outstanding common capital stock of Cloverdale Ford, Inc.; the defendant is the owner of 14.5 percent of the said stock. Pursuant to the terms of the 18 May 1971 agreement, and upon the defendant's discharge, the plaintiff duly tendered payment of \$66,305.31 to the defendant for his stock. The defendant rejected this tender.

On 10 May 1974 the defendant filed a motion for a change of venue from Mecklenburg County to Forsyth County pursuant to G.S. 1-83(1). Defendant contends that G.S. 1-76(4) provides for the action to be tried in Forsyth County, the county wherein the stock certificates are located. Attached to the motion is the affidavit of Herman Shamel, an officer of Wachovia Bank and Trust Company, N.A., stating that the stock certificates have been located in Winston-Salem, Forsyth County, since 6 June 1973.

On 13 May 1974 Judge Copeland heard the cause and entered an order finding

“that plaintiff is a resident of Mecklenburg County; that defendant is a resident of Davie County; that plaintiff's action does not solely or primarily seek the recovery of tangible personal property; that defendant's stock interest in Cloverdale Ford, Inc. and the stock certificate representing such interest is intangible personal property; that the delivery of such stock certificate to plaintiff is only incidental to the specific performance relief sought by plain-

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tiff; that Mecklenburg County is the county of proper venue; that Forsyth County is not the county of proper venue even if the stock certificate owned by defendant is now physically at a bank in said county; and that defendant's motion should be denied because he is not entitled to remove this action as a matter of right; . . ."

The defendant gave notice of appeal to this Court, excepting to the trial court's finding that the defendant was not entitled to remove the action to Forsyth County as a matter of right.

Caudle, Underwood & Kinsey, by C. Ralph Kinsey, Jr., for the plaintiff-appellee.

Hatfield and Allman, by R. Bradford Leggett, for the defendant-appellant.

BROCK, Chief Judge.

Defendant relies upon G.S. 1-76(4) for removal of this action to Forsyth County. G.S. 1-76(4) provides that

"Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in the cases provided by law: . . .
(4) Recovery of personal property when the recovery of the property itself is the sole or primary relief demanded."

There are no cases in North Carolina which apply G.S. 1-76(4) to stock certificates. The defendant contends that the fact that stock certificates are specifically identifiable as personal property, the fact that Cloverdale Ford, Inc., is situated in Forsyth County, and the fact that there is no forum shopping involved in this action should dictate a change of venue to Forsyth County pursuant to the provisions of G.S. 1-76(4) and G.S. 1-83(1).

The plaintiff asserts that the primary relief sought by this action is the specific performance of contract rights; the delivery of the stock certificates is said to be only incidental to that relief. The plaintiff relies on the cases of *Woodard v. Sauls*, 134 N.C. 274, 46 S.E. 507 (1904), and *Flythe v. Wilson*, 227 N.C. 230, 41 S.E. 2d 751 (1947), as being analogous to and determinative of the question on appeal. In *Woodard* an action was brought in Wilson County for the recovery of monies

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and for possession, by ancillary proceeding of claim and delivery, of certain promissory notes owing to the defendant. The defendant had given the notes to the plaintiff as security for a loan and subsequently had recovered the notes. The defendant filed an affidavit averring that he was a resident of Johnston County, that the notes were situated in Johnston County, and moved for a change of venue on the theory that the action was for the recovery of personal property. The trial court denied the motion. On appeal the court affirmed the ruling on the ground that the action was not for the recovery of personal property. The court found that obtaining personal judgment for the plaintiff, determining the liability incurred by the plaintiff as surety, and an adjudication of the collaterals that should be applied thereto were the chief causes of action. Recovery of possession of the collateral notes was only incidental. In *Flythe* the defendant filed a motion for change of venue on similar grounds in a second cause of action to recover monies paid by the bankrupt to the defendant as a voidable preference. The court found that the trial court's denial of the venue motion was proper, as the action was "not for the recovery of specific *tangible* articles of personal property." 227 N.C. at 233 (emphasis supplied). Due to the involvement of other important considerations, these cases, although helpful, are not dispositive of the question on appeal.

A certificate of stock, as distinguished from the stock it represents, is undoubtedly property. *See generally* 11 Fletcher Cyc Corp (Perm Ed), § 5093; *First Nat. Bank of Boston v. Commissioner of Internal Revenue*, 63 F. 2d 685 (1st Cir. 1933). It has a value distinct from the value of the shares it represents. In North Carolina it has been held that a certificate of stock has only such value as is derived from the company issuing it. *Rhode Island Hospital Trust Co. v. Doughton*, 187 N.C. 263, 121 S.E. 741 (1924).

Although certificates of stock are tangible personal property, they are merely tangible evidence of the shares they represent. They are, in short, a symbol of a stockholder's incorporeal rights in a corporation. *Castelloe v. Jenkins*, 186 N.C. 166, 119 S.E. 202 (1923). *See generally* Robinson, North Carolina Corporation Law and Practice, § 61 (1964). For this reason and for reasons of policy, we are not persuaded that certificates of stock represent the kind of personal property which would require a change of venue under G.S. 1-76(4) and G.S. 1-83(1).

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We are aware, however, that certain federal cases have held stock certificates "to be such property as would support jurisdiction through substituted service in an action to determine the ownership of the stock . . . in the district where the stock certificates are located." *Christy and McLean, The Transfer of Stock*, § 12 (1940).

We believe stock certificates to be a kind of intangible, the situs of which is merely the legal conclusion to the problem of which county "can most expeditiously handle the particular case and should, therefore, have . . . jurisdiction." Comment, 37 Minn. L. Rev. 285, 286 (1953). The question is best answered in terms of policy. In the hypothetical case of an action to enforce a preincorporation agreement concerning contingent forfeiture of shares in a four stockholder closed corporation, with each shareholder living in a different county, the most convenient venue is in the county of plaintiff's domicile, the county of incorporation, or the county of corporate domicile. The first is convenient to the aggrieved party; the latter two are convenient due to the presence of corporate records. To hold that G.S. 1-76(4) requires the action to be brought in the county wherein the stock certificates are located would require the aggrieved plaintiff to bring three separate actions in the counties where the other three shareholders have their certificates. *See generally* Comment, 37 Minn. L. Rev. 285 (1953). *But see* Hine, 87 U. Pa. L. Rev. 700 (1939); Comment, 45 Yale L. J. 379 (1935). Similarly, a plaintiff who filed a suit in Wake County against a resident of Durham County could have the action removed to Cherokee County if the defendant chose to place his certificates of stock in that county.

We do not sanction a rule which obviously would be unfair and inconvenient to aggrieved parties and which would raise serious impediments to the right to sue. The action for the recovery of stock certificates in the case at bar is only incidental to the specific performance action for recovery of the stock itself. The defendant's assignment of error to the trial court's finding that Forsyth County is not the county of proper venue is without merit.

Affirmed.

Judges PARKER and MARTIN concur.

State v. Hickman

STATE OF NORTH CAROLINA v. ROBERT LEE HICKMAN

No. 748SC613

(Filed 20 November 1974)

1. Criminal Law § 113—statement of State's evidence

In a prosecution for breaking and entering a drug store and larceny of property therefrom, the evidence supported the trial court's summary of portions of the State's evidence relating to how defendant broke into the drug store and what he stole.

2. Criminal Law § 99—statement by court—no expression of opinion

In a prosecution for breaking and entering and larceny, the trial court did not express an opinion on the evidence when, during cross-examination of the store manager, the court stated, "Let him finish. Tell him how you can identify those Timex watches." and when the court thereafter stated, "What he wants to know is how you could look at those watches and tell them from any other Timex watches."

3. Criminal Law § 99—court's statement to counsel—no expression of opinion

The trial court did not express an opinion when defense counsel began a question with "It is possible, is it not" and the court stated, "Let's not get into possibilities."

4. Larceny § 8—instructions—omission of "without owner's consent"

Trial court's definition of larceny as "the taking and stealing and carrying away the personal property of another with intent on the part of the taker to convert it to his own use and permanently deprive the owner of its use" was proper without the element "without the owner's consent," since the court put the question of the owner's lack of consent to the jury by the use of the word "stealing."

APPEAL by defendant from *Fountain, Judge*, 30 January 1973 Session of CARTERET County Superior Court. Heard in the Court of Appeals 12 November 1974.

The defendant was charged in a two-count bill of indictment with (1) breaking and entering a building with the intent to commit a felony, to wit, larceny; and (2) felonious larceny, after breaking and entering, of eight Timex watches, one Kodak camera and thirty-five (\$35.00) dollars. The defendant pleaded not guilty.

At trial, the State offered the testimony of the manager of Eckerd's Drug Store where the offenses occurred. He testified that entry into the building was accomplished by prying open a skylight on the roof. A Morehead City police officer testified that he answered a call from the police station to in-

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investigate the silent alarm signal from the Eckerd's Drug Store. He checked the front and back doors and windows and found them to be locked. Near the back door, the officer saw the defendant standing approximately twenty feet from the store. A few minutes thereafter another officer saw the defendant in an automobile driving away from the store. It was not until later that the officers discovered that someone had broken into the store. Five days after the break-in, an S.B.I. agent arrested the defendant, at which time he found some marijuana and eight Timex watches in a paper bag on the front seat of the car the defendant was driving. He was taken to the New Bern jail for safekeeping and thereafter returned to Morehead City where he signed a confession after being given the Miranda warnings. This confession was admitted into evidence after the trial judge on voir dire found that it was voluntarily and understandingly made.

The defendant testified, denying the charges and claiming that the confession was the result of a series of transactions and conversations which led the defendant to believe that he was going to be charged with armed robbery. He said that officers had been talking about an armed robbery as he was being transported back to Morehead City from New Bern and that they had asked him for one of his tennis shoes to see if it would match a print taken at the scene of the robbery. He testified that the officers did not threaten him or offer him leniency as an inducement to sign the confession.

The jury returned a verdict of guilty as charged. From a judgment sentencing the defendant to not less than seven nor more than ten years on each count to run concurrently, the defendant appealed.

Attorney General James H. Carson, Jr., by Assistant Attorney General George W. Boylan for the State.

Wheatly & Mason by C. R. Wheatly III for defendant appellant.

CAMPBELL, Judge.

[1] The appellant contends that the trial court erred in the charge in summarizing certain portions of the evidence relating to how the defendant broke into the drug store and what he stole. The State's evidence showed that the store was entered

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through the skylight and that some eight Timex watches and a camera were stolen. There was also evidence that no windows or doors had been entered. The defendant was later arrested with eight Timex watches in his possession and subsequently signed a confession admitting the crime. The confession was admitted in evidence after a proper voir dire examination and finding by the court.

On the basis of the above evidence, the trial judge charged the jury that "[t]he State offers evidence tending to show that . . . the defendant broke into Eckerd's Drug Store . . . ; that he went through a skylight . . . and took some eight or nine Timex watches and a camera; that he went out the same way and was seen shortly after the alarm was given. . . ." The charge is contextually in conformity with the evidence as presented. We find no error in this portion of the charge.

[2] Next the defendant contends that the court expressed an opinion at various points during the trial in statements made by the court before the jury. We have examined the record pertaining to the alleged expressions of opinion and fail to find that the record supports the contention of the appellant. A typical instance complained of by the appellant shows the following on the cross-examination of the store manager:

"Q. Then when you were shown some watches how do you know they were the same watches?

A. For the simple reason just a few days prior to that—O.K. Timex watches are not the most plentiful quantity on the market. Periodically we get bulletins.

Q. What do you mean by that?

A. THE COURT: Let him finish. Tell him how you can identify those Timex watches.

A. Periodically we get bulletins out of Charlotte showing us what watches they have received at the warehouse. Just a few days prior to this I had written an A-1 which is an order to Charlotte with these watches on that order.

THE COURT: What he wants to know is how you could look at those watches and tell them from any other Timex watches.

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A. You mean from the same model of that watch to the same model of another watch?

Q. Right.

A. There is no way.

Q. Then you don't know of your own knowledge whether or not the watches that were shown to you are the same watches that were in your store.

A. The same watches; no, sir.

Q. Of your own knowledge these watches could have come from anywhere?

THE COURT: Objection sustained. He's answered your question. Don't argue."

We fail to find that this is an expression of an opinion on behalf of the court that could in any way be considered prejudicial to the defendant. On the contrary it was an effort on the part of the court to expedite the trial and obtain a clear understanding of the evidence. This is a proper function of the trial judge.

[3] In another instance, counsel for the defendant was questioning an officer about what had occurred when he went to the drug store to answer the alarm. The part complained of by the appellant follows:

"Q. You got a call the alarm had gone off when you shook the doors, did you not?

A. Yes, sir.

Q. It is possible, is it not —?

THE COURT: Let's not get into possibilities, Mr. Wheatly."

Again, this was an effort on the part of the court to expedite the trial and keep the trial within proper bounds. We hold that the record does not show that the trial court expressed any opinion on the merits of the case.

[4] The appellant's last assignment of error is that the trial court incorrectly charged the jury on the elements required to constitute the crime of larceny. Specifically, the appellant asserts that the court omitted the element "without the owner's consent." The trial court defined larceny as "the taking and steal-

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ing and carrying away the personal property of another with the intent on the part of the taker to convert it to his own use and permanently deprive the owner of its use." This definition does not specifically refer to the owner's consent, but considered contextually it is nevertheless a proper charge. By use of the word "stealing" the court put the question of the owner's lack of consent to the jury. "Stealing" is taking another's property without permission and is understood in common usage to be a taking without right, something that any juror would understand and appreciate. Therefore, in context, we find that the charge properly put the various elements of larceny before the jury for their consideration.

We find no prejudicial error in the trial below.

Judges MORRIS and VAUGHN concur.

HIXIE J. POPE, ADMINISTRATRIX OF THE ESTATE OF ERNEST ALTON POPE, JR., DECEASED v. C. H. McLAMB, GARLAND McLAMB, ERNEST McLAMB & GERALD McLAMB, A PARTNERSHIP, T/A McLAMB BROTHERS HOG MARKET

No. 7411SC616

(Filed 20 November 1974)

1. Appeal and Error § 48—hearsay—harmless error

Plaintiff was not prejudiced by the admission of hearsay evidence that defendant told a patrolman that his truck was traveling 45 mph at the time of the accident in question where the jury answered the issue of defendant's negligence in plaintiff's favor.

2. Automobiles § 85; Negligence § 18—contributory negligence of minor—instructions

In an action for the wrongful death of an 11-year-old child who was struck by defendant's truck while riding his minibike, the trial court properly charged the jury on the presumption that a child between the ages of seven and fourteen is incapable of contributory negligence and on the burden of proof necessary to rebut that presumption.

APPEAL by plaintiff from *Peel, Judge*, 4 March 1974 Session of Superior Court held in JOHNSTON County. Heard in the Court of Appeals 25 September 1974.

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This is an action to recover damage for the wrongful death of plaintiff's intestate resulting from the alleged negligence of defendants. On the day on which the fatal accident from which this lawsuit arose occurred, plaintiff's intestate and two of his friends had been riding their minibikes in the vicinity. On numerous occasions, the bike of plaintiff's intestate had broken down. The evidence was that it would not idle and the deceased had to "rev up" the motor at a high speed to keep it running. He was having trouble with his spark plug. He had removed it, scraped it, and put it back at a store to which they had gone to get a drink just shortly before the accident, and the three (deceased, Frankie Thornton and Michael Langdon) started off again. They went a short way, and stopped because the chain came off Frankie's minibike. Deceased and Michael stopped on the right shoulder of the road and were waiting at the end of a woods path for Frankie to get his chain back in place. While the two were waiting for Frankie to get his chain on and catch up, deceased was having to "keep his motor revved up because it wouldn't idle." The deceased was leaning over to "crank it and when he revved the motor up and when he did it just took off forward with him." The deceased was sitting a "foot and a half to two feet" from the paved portion of the road. Plaintiff's witness, Michael Langdon, gave this account:

"I was looking at E.A. (deceased) when this accident occurred and he was sitting right beside me on his minibike. He was about 4 feet from me. For some unknown reason it just shot forward with him. I know he didn't put it in gear. For one thing because when it came up there it was on its back wheel when it was struck. . . . E.A. and I were about the same distance from the paved portion of the road. . . . E.A. was not over a foot further away from the paved portion than I. When E.A.'s vehicle caught the pavement it just come up on its back wheel with him and about that time the truck came long and struck him. I first saw the truck when it was 300 feet or more away. The truck was traveling away from Benson. That would be North. After I first saw the truck I looked back down at the motorbike and he were revving it up to keep the motor running. He had a problem with it and it kept trying to knock off with him. As to the truck, yes, sir, I looked up one or more times, once or twice. I looked at the truck also while we were sitting there. In my opinion the truck was

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running 60 or better, 60 miles per hour. The driver of the truck did not blow his horn. The road was straight. I seen the whole thing. When the minibike reared up and went out into the path of the truck and it struck it, . . .”

Frankie Thornton testified that while he was fixing his chain he did not take his eyes off deceased and the truck, which he saw when it was 500 feet away from him. The truck when he first saw it would have been 300 feet away from deceased and Michael because they were some 200 feet ahead of witness. Deceased's minibike “somehow or other it jumped in gear and lunged out in front of the truck.” The truck did not slow down or blow its horn and was travelling “60 miles per hour or better.” Witness had been on the shoulder of the road some two or three minutes prior to impact.

At the conclusion of plaintiff's evidence, defendants moved for a directed verdict. The motion was allowed as to all defendants except C. H. McLamb, the driver of the truck. Defendant offered no evidence. After arguments of counsel, the court, on its own motion, allowed into evidence testimony of the highway patrolman with respect to a conversation of the driver of the truck to the effect that the truck was being operated at a speed of 45 miles per hour at the time of the collision. This testimony had been elicited by defendant on cross-examination but was excluded by the court at the time it was elicited. Plaintiff objected and excepted to the procedure and assigns it as error on appeal.

Robert A. Spence, P.A., for plaintiff appellant.

George B. Mast, P.A., by Joseph T. Nall, for defendant appellee.

MORRIS, Judge.

[1] By her first assignment of error plaintiff contends that the action of the court in allowing into evidence the testimony of the patrolman as to defendant's statement with respect to his speed was prejudicial error. We agree that the court erred in admitting this testimony. It was clearly hearsay. It was elicited on cross-examination, could only be corroborative if defendant testified, and defendant did not testify and subject himself to cross-examination. Nevertheless, we fail to see how plaintiff has been prejudiced. The patrolman testified the speed limit at that point was 45 miles per hour for defendant. Plaintiff's wit-

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nesses testified the truck was travelling at a speed of 60 miles per hour and neither reduced its speed nor sounded its horn. The jury obviously believed this testimony and gave no credence to the statement of defendant that he was driving 45 miles per hour, since they answered the issue of defendant's negligence in favor of plaintiff. We cannot see that plaintiff has been prejudiced in any way by the admission of this evidence, and this assignment of error is overruled.

Assignment of error No. 2 is based upon an exception taken to a portion of the charge of the court in which the court, in recapitulating the evidence, repeated the hearsay testimony allowed into evidence and discussed above. For the same reasons set out above, this assignment of error is also overruled.

[2] Finally, plaintiff argues that the court erred in its charge to the jury with respect to the duty of care placed upon an infant and with respect to the standard of care required of a motorist upon observing an infant upon the highway. The court, in charging upon the second issue, instructed the jury that the evidence tended to show that plaintiff's intestate was, at the time of the accident, 11 years of age; that under the law of this State, a child under 7 is incapable of contributory negligence and that a child between 7 and 14 is presumed to be incapable of contributory negligence, but that that presumption may be rebutted by showing that the child failed to exercise that degree of care which a child of its age, capacity, discretion, knowledge and experience would ordinarily exercise under the same or similar circumstances. The court further instructed that in the case of a child between 7 and 14 years, the burden would be upon the party attempting to establish the child's contributory negligence to show, by the greater weight of the evidence, that the child had failed to use the degree of care which a child of his age, capacity, discretion, knowledge and experience would ordinarily have exercised under the same or similar circumstances. The court, it is true, did not repeat the same verbiage in charging the jury as to what they must find in order to find the plaintiff's intestate guilty of contributory negligence. However, he did again charge them that the rule previously explained as to the contributory negligence of a child between 7 and 14 would apply in this case.

As to the charge on the standard of care required of a motorist upon observing an infant upon the highway, we think the court's charge sufficiently conformed to the applicable law.

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Considering the charge in its entirety, we find no basis for believing that the jury could have been misled thereby. These assignments of error are, therefore, overruled.

No error.

Judges HEDRICK and BALEY concur.

JOHNNY MICHAEL McLAMB v. CHARLES JONES

No. 7411SC740

(Filed 20 November 1974)

Negligence § 60— plaintiff trespasser — cable across path — liability of defendant trespasser

In an action to recover damages for personal injuries sustained by plaintiff when he ran into a cable stretched across a path by defendant, defendant could not rely on plaintiff's status as a trespasser in asserting that his standard of care was only that plaintiff not be wilfully or wantonly injured, since defendant was a trespasser himself in that he did not lease any of the path in question, own any land in the area, or have permission to go on the land where the accident occurred.

APPEAL by defendant from *Hobgood, Judge*, 6 May 1974 Session of Superior Court held in JOHNSTON County. Heard in the Court of Appeals 16 October 1974.

This is a civil action seeking damages for personal injuries sustained by the plaintiff allegedly resulting from defendant's negligence. From a jury verdict awarding plaintiff \$7,500 as damages, defendant appealed.

Evidence introduced by the plaintiff tended to show that on 18 October 1969, the date of the incident herein involved, plaintiff was 15 years of age; that it was a Sunday afternoon, and plaintiff and his cousin were going to play baseball; that plaintiff was driving his cousin's Honda motorcycle with his cousin riding on the back; that plaintiff was travelling down a two-rut dirt farm path about 300 feet from the Dunn-Benson Drag Strip over which he and others frequently travelled; that a steel cable had been stretched across the path by the defendant or his agents about four feet from the ground and tied to trees on either side of the path; that there were no warning

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signs on the cable or in the vicinity and that the cable had not been there when plaintiff travelled on the path two weeks previously; that plaintiff was right at the cable before he saw it and struck the cable before he was able to stop the Honda.

Other evidence of the plaintiff tended to show that the cable struck the plaintiff in the stomach, knocking him from the Honda and causing him serious injuries; that as a result of these injuries plaintiff had to undergo two abdominal surgery procedures, one at the Betsy Johnson Memorial Hospital in Dunn, North Carolina, and one at Duke Hospital in Durham, North Carolina; and that plaintiff was hospitalized for approximately six weeks altogether and suffered great pain and suffering as a result of his injuries.

Plaintiff's evidence also tended to show that defendant leased and operated the Dunn-Benson Drag Strip which was located about 300 feet from the scene of the accident but that the property on which the accident actually occurred was neither owned nor leased by the defendant.

Defendant's evidence, on the other hand, tended to show that some two to three hundred feet from the Drag Strip which he leased and operated was a path which had been in existence for a number of years; that during the course of one of the races at the Drag Strip some persons attempted to enter the premises through this path and nearly caused a serious wreck; that thereafter the defendant decided that a cable should be placed across this path to keep persons from entering the premises when a race was in progress; that he or persons under his direction instructed his employees to put the cable up on the night prior to the race and take it down after each race; that the cable was in no manner concealed or hidden and that "Keep Out" and "No Trespassing" signs were erected in the vicinity of the cable.

Additional facts necessary for decision are set forth in the opinion.

Bryan, Jones, Johnston, Hunter and Greene, by Robert C. Bryan, for plaintiff appellee.

Stewart and Hayes, P.A., by D. K. Stewart, for defendant appellant.

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MORRIS, Judge.

Defendant's first assignment of error relates to the denial of his motion for involuntary dismissal under Rule 41(b) of the Rules of Civil Procedure. While "a motion to dismiss under this rule is not properly available in cases being tried by jury," *Hamm v. Texaco, Inc.*, 17 N.C. App. 451, 454, 194 S.E. 2d 560 (1973), in our discretion, plaintiff having made no objection to defendant's failure to state proper rule number, we have decided to treat defendant's motion as a motion for a directed verdict under Rule 50(a), which would have been the proper motion for defendant to make in this case to test the sufficiency of the plaintiff's evidence to get his case to the jury.

In support of his motion, defendant argues that plaintiff was upon the area in question without the permission of the owner and that if such facts are to be believed, then the owner or person in control of the premises owed to the plaintiff only the duty not to injure him willfully or wantonly. Defendant contends that nowhere in the record is there evidence that he willfully or wantonly caused injury to the plaintiff and, therefore, it was error to submit the case to the jury.

We recognize the well-settled principle that the standard of care owed by an owner or person in control of the premises to a trespasser is he "must not be willfully or wantonly injured." *Bell v. Page*, 271 N.C. 396, 399, 156 S.E. 2d 711 (1967); *Dean v. Construction Co.*, 251 N.C. 581, 587, 111 S.E. 2d 827 (1960). In examining the record, however, we are unable to find any evidence that the defendant was the owner or in control of the premises. To the contrary defendant's own evidence shows that his lease was solely for the Drag Strip, that he did not lease any of the road in question and that he owned no land in the area. Furthermore, there is no evidence that he had permission to go on the land where the accident occurred. Apparently, defendant was just as much a trespasser on the land as the plaintiff. In any event, plaintiff's trespass was against the owner of the property on which the accident occurred, not against the defendant. For this reason, we are of the opinion, and so hold, that defendant cannot rely on plaintiff's status as a trespasser in asserting that his standard of care was only that plaintiff not be willfully or wantonly injured.

Defendant's only other assignment of error relates to the trial judge's charge to the jury and may be dealt with sum-

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marily. Defendant maintains that the court was required to instruct the jury on the duty of care owed to a trespasser. This assignment of error presupposes defendant is entitled to the protection and defenses available to an owner of premises or a person in control of premises with respect to trespassers. As we have concluded that the defendant in this case does not have such rights, this assignment of error is overruled.

No error.

Judges HEDRICK and BALEY concur.

J. L. CANADY, TRADING AS J. L. CANADY PLUMBING & HEATING COMPANY v. ERVIN E. CREECH AND WIFE, DOROTHY CREECH AND RAY P. KORTE AND WIFE, BARBARA D. KORTE

No. 7410DC782

(Filed 20 November 1974)

Laborers' and Materialmen's Liens § 7—notice of claim of lien—reference to wrong date materials first furnished

Notice of claim of lien for labor and materials filed on 8 October 1973 which referred to 4 December 1973 instead of 1972 as the time labor and materials were first furnished was fatally defective. G.S. 44A-12(c) (5).

Judge BALEY dissenting.

APPEAL by plaintiff from *Barnette, Judge*, 11 March 1974 Session of District Court held in WAKE County. Heard in the Court of Appeals 23 October 1974.

This is an action to have a lien declared on real estate for labor and materials furnished in the construction of a dwelling thereon. On 8 October 1973 plaintiff filed a notice of claim of lien in which he stated that "[t]he labor and materials were first furnished upon said property by the Claimant on or about December 4, 1973." (Emphasis supplied.) Answers to defendants' interrogatories indicated that materials and labor actually were first furnished on the job site on 3 November 1972. No other notice of claim of lien was filed by the plaintiff.

Upon defendant's motion for dismissal of plaintiff's action with prejudice and discharge of the purported lien, the trial

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judge made findings of fact and concluded as a matter of law that the "[l]ien filed by the plaintiff on October 8, 1973, is fatally defective as it is impossible for the plaintiff claimant to have first furnished labor and materials on or about December 4, 1973" and that the plaintiff's complaint "does not state sufficient facts to state a cause of action upon which relief can be granted." From the order of the trial judge discharging the notice of claim of lien and dismissing the action against the defendants with prejudice, plaintiff appealed.

Additional facts necessary for decision are set forth in the opinion.

Mast, Tew & Nall, P.A., by Allen R. Tew, for plaintiff appellant.

No counsel for defendant appellees.

MORRIS, Judge.

Plaintiff contends that the court erred in concluding that the notice of lien filed 8 October 1973 was fatally defective.

It is undisputed that the notice of claim of lien filed by the plaintiff on 8 October 1973 erroneously states that materials and labor were first furnished on 4 December 1973 when, in fact, as shown by answers to defendants' interrogatories, materials and labor were first furnished on 3 November 1972. Plaintiff could not possibly have first furnished materials and labor on 4 December 1973 since at the time the notice of claim of lien was filed, this date was still approximately two months away. Plaintiff concedes this fact but maintains that this is an obvious clerical error that should not affect his rights under G.S. 44A-7 et seq., the Mechanics', Laborers' and Materialmen's Lien statute. He takes the position that the notice constitutes substantial compliance with the statute and that as a matter of equity he should be allowed to enforce his lien. We disagree. The notice of claim of lien does not substantially comply with the statute. In our opinion it is fatally defective.

G.S. 44A-12(c) (5) provides that the "Date upon which labor or materials were first furnished upon said property by the claimant" must be set forth in the claim of lien. This is necessary since G.S. 44A-10 states that "Liens granted by this article shall relate to and take effect from the time of the first furnishing of labor or materials at the site of the improvement

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by the person claiming the lien." Where, as here, the notice of claim of lien shows on its face that the date stated to be the date of the first furnishing of materials or labor is incorrect, the requirements of the statute have not been met and the lien is invalid and without force and effect. A lien is lost if the steps required to perfect it are not taken in the same manner and within the time prescribed by law. *Priddy v. Lumber Co.*, 258 N.C. 653, 129 S.E. 2d 256 (1963) [a suit between a holder of a deed of trust and a lienor-judgment creditor to establish the priority of their liens].

"... there must be a substantial compliance with the statute, *i.e.*, a statement in sufficient detail to put interested parties, or parties who may become interested, on notice as to labor performed or materials furnished, *the time when the labor was performed and the materials furnished*, the amount due therefor, and the property on which it was employed. *Lowery v. Haithcock*, *supra*; *King v. Elliott*, *supra*; *Cameron v. Lumber Co.*, 118 N.C. 266, 24 S.E. 7; *Cook v. Cobb*, *supra*.

The claim of lien is the foundation of the action to enforce the lien, and if such lien is defective when filed, it is no lien. *Jefferson v. Bryant*, *supra*." (Emphasis supplied.) *Lumber Co. v. Builders*, 270 N.C. 337, 341; 154 S.E. 2d 665 (1967).

As was the case in *Strickland v. Contractors, Inc.*, 22 N.C. App. 729, 207 S.E. 2d 399 (1974), the error appears on the face of the notice of claim of lien. We think what we said in that case appropriate here:

"... all potential purchasers or lenders interested in the subject property and relying on the public record would be advised that the claim of lien had not been filed in accordance with the statute, and was not enforceable against the property. To require the title examiner to go outside the public record to discover that the stonework was in fact—as plaintiff claims—completed less than 120 days prior to the filing would in our opinion impose an undue burden on the title examiner and would damage the principle of reliance upon the public record." *Id.* at 732.

If laborers can file notices of lien stating an incorrect date of first furnishing and then enforce their liens with priority as of the actual date of first furnishing, it would be impossible

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for anyone to determine the priority of laborer's liens by a search of the records. If we were to hold the lien is valid but the holder of the lien is bound by the date of first furnishing set out in the notice, an impossible result would obtain. Plaintiff would have filed a notice of lien which would be effective some two months *after* it was filed—the materials, according to the notice, not having been furnished until that time.

For the reasons stated herein, the court correctly dismissed the plaintiff's action and discharged the notice of claim of lien.

Affirmed.

Judge HEDRICK concurs.

Judge BALEY dissents.

Judge BALEY dissenting.

The notice of lien was filed 8 October 1973 and by mistake referred to 4 December 1973 instead of 1972 as the time labor and materials were first furnished. To me it is an obvious clerical error which could not mislead any interested party.

ALLEN & O'HARA, INC. v. KENNETH E. WEINGART AND WIFE,
DOROTHY P. WEINGART

No. 7426SC796

(Filed 20 November 1974)

1. Courts § 2—quasi in rem jurisdiction — action arising outside N. C. — attachment of realty in N. C.

The courts of this State obtained *quasi in rem* jurisdiction to adjudicate a cause of action arising wholly outside this State when a nonresident plaintiff, pursuant to G.S. 1-440.1 *et seq.*, attached the real property of a nonresident defendant located in this State. G.S. 1-75.8.

2. Attachment § 3—attachment of property of nonresident — action for money judgment

Attachment was proper in nonresident plaintiff's action to recover a money judgment against a nonresident defendant. G.S. 1-440.2; G.S. 1-440.3(1).

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3. Attachment § 9—motion to dissolve—necessity for findings of fact

When the defect alleged as grounds for a motion to dissolve an order of attachment appears on the face of the record, no issues of fact arise, the motion is heard and determined upon the record, and the court need not make findings of fact. G.S. 1-440.36(b).

APPEAL by defendants from *Godwin, Judge*, 27 May 1974 Session of Superior Court held in MECKLENBURG County. Heard in the Court of Appeals on 23 October 1974.

This is a civil action wherein the plaintiff, Allen & O'Hara, Inc., seeks to recover \$620,074.00 from the defendants, Kenneth E. Weingart and Dorothy P. Weingart, on a guaranty of completion agreement entered into by the parties.

Plaintiff is a corporation organized and existing under the laws of the state of Tennessee. Defendants are residents of Florida and are owners as tenants by the entirety of certain real property in Mecklenburg County, North Carolina. The record discloses that on 25 February 1974 the plaintiff filed an affidavit, posted a bond, and obtained an order from the Clerk of Superior Court of Mecklenburg County directing the sheriff to attach the defendant's property. On the same day, plaintiff filed its complaint, seeking a money judgment against the defendants. The plaintiff alleged that on 9 June 1972 plaintiff and B. J. S. Builders, Inc., of McIntosh, Florida, entered into a subcontract wherein B. J. S. Builders agreed to furnish certain work, materials, services, tools, labor, and equipment in the construction of two apartment projects in Daytona Beach, Florida. On 20 July 1973, the defendants entered into a contract with the plaintiff wherein the defendants agreed to indemnify the plaintiff against any loss the plaintiff might suffer as a result of the failure of B. J. S. Builders to perform the subcontract. Plaintiff further asserted that the subcontract has not been performed and that the plaintiff has been damaged in the amount of \$620,074.00.

The defendants filed answer on 6 May 1974 and asked the court to dismiss the plaintiff's complaint on the grounds (1) that the court lacked jurisdiction over the subject matter and jurisdiction over the person; (2) that there was insufficiency of process and service of process; and (3) that the complaint failed to state a claim upon which relief could be granted. The defendants also asked the court, pursuant to G.S. 1-440.36, to dissolve the order of attachment on the grounds that the court lacked

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jurisdiction over the subject matter and jurisdiction over the person.

On 30 May 1974, the trial court denied defendants' motions. Defendants appealed from the denial of their motion to dissolve the order of attachment.

Farris, Mallard & Underwood, P.A., by Charles H. Cranford for plaintiff appellee.

Cole & Chesson by Calvin W. Chesson for defendant appellants.

HEDRICK, Judge.

[1] The principal question presented by this appeal is whether the courts of this state obtain quasi in rem jurisdiction to adjudicate a cause of action arising wholly outside this state when a nonresident plaintiff, pursuant to G.S. 1-440.1 et seq., attaches the real property of a nonresident defendant located in this state.

G.S. 1-75.8, in pertinent part, provides:

"A court of this State having jurisdiction of the subject matter may exercise jurisdiction in rem or quasi in rem on the grounds stated in this section. A judgment in rem or quasi in rem may affect the interests of a defendant in a status, property or thing acted upon only if process has been served upon the defendant pursuant to Rule 4(k) of the Rules of Civil Procedure. Jurisdiction in rem or quasi in rem may be invoked in any of the following cases:

* * *

(4) When the defendant has property within this State which has been attached or has a debtor within the State who has been garnished. Jurisdiction under this subdivision may be independent of or supplementary to jurisdiction acquired under subdivisions (1), (2) and (3) of this section."

A quasi in rem action is a "proceeding to establish personal liability in which property of a defendant who cannot be subjected to personal jurisdiction is taken into judicial custody by attachment or similar ancillary proceeding to provide both a jurisdictional basis for proceeding and a limited source out of which any personal liability adjudicated can be realized." 1 McIntosh, North Carolina Practice and Procedure § 938.10, at 191 (Phillips Supp. 1970).

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Referring to G.S. 1-75.8(4), Dean Phillips further states:

"The grounds for exercise of jurisdiction quasi in rem are stated in terms to include any proceeding wherein property of the defendant within the state has been attached or a debtor of the defendant within the state has been garnished." 1 McIntosh, *supra*, § 938.15, at 193.

Thus, it seems clear that the court in the instant case obtained quasi in rem jurisdiction if the defendants' real property located in this state was properly attached.

[2] Reference must be made, therefore, to the North Carolina attachment statutes to determine if attachment was permissible in the instant case. G.S. 1-440.2 specifically allows attachment in any action the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money; and G.S. 1-440.3(1) allows the issuance of an order of attachment in such a proceeding when the defendant is a nonresident. Since the defendants concede both the fact that the plaintiff seeks a money judgment and the fact that he is a nonresident, the grounds for attachment of the defendants' real property were clearly met.

The fact that the plaintiff is a nonresident and that the cause of action arose outside this state does not invalidate the attachment or divest the court of the authority to exercise the quasi in rem jurisdiction obtained by the attachment. See *Walters v. Breeder*, 48 N.C. 64 (1855); *Cheshire National Bank v. Jaynes*, 224 Mass. 14, 112 N.E. 500 (1916); F. James, Civil Procedure § 12.7, at 631 (1965).

[3] Defendants contend the court erred in not finding facts upon which to base its order denying the motion to dissolve the attachment. When the defect alleged as grounds for the motion to dissolve an order of attachment appears upon the face of the record, no issues of fact arise, and the motion is heard and determined upon the record. G.S. 1-440.36(b). Here, all of the defects alleged as grounds for dissolving the attachment of defendants' property appear on the face of the record, and there was no necessity for the court to make findings of fact. The order denying the motion is

Affirmed.

Judges MORRIS and BAILEY concur.

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DORIS LOVELACE BOONE, MARY ATKINS LOVELACE AND JOE
DAVID LOVELACE v. MARY BOONE

No. 7417DC763

(Filed 20 November 1974)

1. Appeal and Error § 6—trial court's attempt to expunge appeal

Trial court's order attempting to expunge defendant's appeal from an interlocutory child custody order on the ground that no appeal lay from such order was a nullity since it is for the appellate court to determine whether the appeal is premature.

2. Appeal and Error § 16—jurisdiction of trial court pending appeal

While an appeal was pending from an interlocutory order awarding custody of children to plaintiffs, the trial court had no jurisdiction to entertain plaintiff's motion in the cause to have defendant's counsel appear and answer questions as to what information he had as to the whereabouts of defendant and the children.

APPEAL by plaintiffs from *Clark, Judge*, 11 July 1974 Session of District Court held in ROCKINGHAM County. Heard in the Court of Appeals on 19 September 1974.

This is an appeal from an order of the district judge dismissing a motion in the cause on the grounds that the court lacked jurisdiction to hear the same pending an appeal.

Plaintiffs, Doris Lovelace Boone (mother), Mary Atkins Lovelace and Joe David Lovelace (maternal grandparents), instituted this action to obtain custody of Gregory Thomas Boone, age 7, Mark Todd Boone, age 5, and Mary Nicole Boone, age 9 months, from the defendant, Mary Boone (paternal grandmother). Pursuant to a hearing on the plaintiffs' motion for an award of custody pending the final determination of the cause of the merits, Judge Harris on 22 May 1974 entered an order awarding custody of the children to the plaintiffs. Upon the entry of this order, the defendant in open court gave notice of appeal to the Court of Appeals. (The defendant's appeal from the order dated 22 May 1974 was docketed in this court on 23 August 1974.)

On 25 May 1974 Judge Harris, after reciting that the defendant could not appeal from the interlocutory order of 22 May 1974, entered an order which in pertinent part provides:

"Now, THEREFORE, IT IS ORDERED that the defendant's entry of appeal be and is hereby stricken and expunged

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from the record and that the Sheriff of Rockingham County be and is hereby directed to take control of the persons of Gregory Thomas Boone, Mark Todd Boone, and Mary Nicole Boone, and to deliver the said children into the general care, custody and control of the plaintiffs in accordance with the foregoing order."

On 27 June 1974, alleging that the plaintiffs had caused a warrant to be issued charging the defendant with abducting the children and that the Sheriff of Rockingham County had been unable to locate the defendant and that the defendant's attorney, Benjamin R. Wrenn, "undoubtedly *would have* pertinent information as to the whereabouts of the defendant" (emphasis ours), the plaintiffs filed a motion in the cause to have defendant's attorney appear before the court and give answers to specific questions as to what information he had, if any, as to the whereabouts of the defendant.

From an order of District Judge Clark dated 11 July 1974 (the motion having been set for hearing by order of Judge Harris dated 27 June 1974 before the judge presiding at the district court in Reidsville on 11 July 1974) dismissing the motion on the grounds that the court lacked jurisdiction to hear it pending the appeal, the plaintiffs appealed to this court.

Gwyn, Gwyn & Morgan by Julius J. Gwyn for plaintiff appellants.

No counsel contra.

HEDRICK, Judge.

[2] Plaintiffs contend Judge Clark erred in refusing to entertain their motion to have defendant's counsel of record appear and answer questions as to what information he had as to the whereabouts of his client pending the appeal of the interlocutory order awarding custody of the children to the plaintiffs.

The general rule as to jurisdiction of the trial court after notice of appeal has been given and appeal entries filed has been explicitly stated by our Supreme Court. In *Wiggins v. Bunch*, 280 N.C. 106, 108, 184 S.E. 2d 879, 880 (1971), we find:

"For many years it has been recognized that as a general rule an appeal takes the case out of the jurisdiction of the trial court. In *Machine Co. v. Dixon*, 260 N.C. 732, 133 S.E. 2d 659, it was stated:

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‘As a general rule, an appeal takes a case out of the jurisdiction of the trial court. Thereafter, pending the appeal, the judge is *functus officio*. “ . . . (A) motion in the cause can only be entertained by the court where the cause is.” Exceptions to the general rule are: (1) notwithstanding notice of appeal a cause remains *in fieri* during the term in which the judgment was rendered, (2) the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned, (3) the settlement of the case on appeal’ ”

See *Sink v. Easter* filed in the Court of Appeals on 16 October 1974.

[1] None of the exceptions to the general rule has any application in this case. There being no allegation or showing on the part of the plaintiffs that the defendant had abandoned her appeal, Judge Clark necessarily had to determine from the record presented to him whether an appeal was pending. The record before him showed on its face that the defendant in open court had given notice of appeal from Judge Harris’ interlocutory order dated 22 May 1974. The trial court can neither allow nor refuse an appeal. *Harrell v. Harrell*, 253 N.C. 758, 117 S.E. 2d 728 (1961); *Veazey v. Durham*, 231 N.C. 357, 57 S.E. 2d 377 (1950); *Development Co. v. Phillips*, 3 N.C. App. 295, 164 S.E. 2d 516 (1968). Thus, Judge Harris’ order dated 25 May 1974 attempting to expunge the notice of appeal was a nullity, and the defendant and Judge Clark were justified in disregarding it.

[2] Plaintiffs’ contention that no appeal was taken from the order of 22 May 1974 was belied by the record presented to Judge Clark and the record docketed in this court in this proceeding. Furthermore, we take judicial notice of the fact that defendant’s appeal from the order of 22 May 1974 was docketed in this court on 23 August 1974. Whether that appeal is premature is a matter to be determined by this court. Under the circumstances of this case, we find no reversible error in Judge Clark’s refusal to entertain the plaintiffs’ motion. See *Joyner v. Joyner*, 256 N.C. 588, 124 S.E. 2d 724 (1962); *Collins v. Collins*, 18 N.C. App. 45, 196 S.E. 2d 282 (1973).

Affirmed.

Judges BRITT and BALEY concur.

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STATE OF NORTH CAROLINA v. TONY DERICO RICHMOND

No. 749SC755

(Filed 20 November 1974)

1. Criminal Law § 66—pretrial photographic identification—admissibility of in-court identification

The trial court properly determined that a witness's in-court identification of defendant was based on observation at the crime scene where evidence tended to show that the witness observed defendant from a distance of twenty feet, then approached him and finally grabbed him by the wrist, that the witness described defendant to officers, and that the witness picked defendant's photograph from a line-up of ten promptly and without difficulty.

2. Criminal Law § 66—photographic identification—limitation of cross-examination proper

The trial court did not err in refusing to permit cross-examination of a witness concerning the appearance of skin color of individuals portrayed in the black and white photographs used in a pretrial identification procedure.

3. Criminal Law § 113—instruction on alibi evidence—request required

The trial court did not err in failing to give specific instructions to the jury upon the legal effect of alibi evidence where defendant made no request for such instructions.

APPEAL by defendant from *Bailey, Judge*, 11 March 1974 Session of Superior Court held in PERSON County.

Heard in Court of Appeals 15 October 1974.

Defendant was indicted on charges of felonious breaking and entering and felonious larceny on 29 August 1973 at Bob's Barbeque in Roxboro. He pleaded not guilty to both charges and was tried before a jury.

Walter Woody, proprietor of Bob's Barbeque, testified for the State that on the night of 29 August 1973 he remained at his restaurant after closing and fell asleep in his office while working on his books. He was awakened about 4:20 a.m. by the ringing of a cash register bell. He went into the dining area and saw a man standing about twenty feet from him at a register. After watching about a minute, he approached the counter and saw the man with his hands full of money. When the man saw Woody he gave Woody the money and attempted to pass when Woody grabbed him by the wrist. He jerked free and fled through the front door which had been broken open and joined a second man outside the building.

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Before Woody identified defendant as the person who confronted him in his restaurant, the court held a *voir dire* hearing to determine if the identification testimony was admissible. Both Woody and police officer Melvin Ashley testified that Woody picked the photograph of defendant from several black and white photographs presented to him at the police station. Both witnesses testified that no one suggested which photograph to select. The photographs which were used in the identification procedure were introduced in evidence. All of them portrayed young black males, and none was strikingly different from the others. Woody testified that he recognized defendant's photograph "virtually as soon as I saw it."

Defendant submitted testimony of his mother, brother, and employer which tended to show an alibi, that defendant was home in bed at the time the crime was committed.

The jury found defendant guilty of felonious breaking and entering and not guilty of larceny. From judgment imposing a prison term, he has appealed to this Court.

Attorney General James H. Carson, Jr., by Associate Attorney Robert P. Gruber, for the State.

Ramsey, Jackson, Hubbard and Galloway, by Mark Galloway, for defendant appellant.

BALEY, Judge.

Defendant contends that the court erred in admitting the identification testimony of the State's witness, Walter Woody.

"When the admissibility of in-court identification testimony is challenged on the ground it is tainted by out-of-court identification(s) made under constitutionally impermissible circumstances, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the tests of admissibility. When the facts so found are supported by competent evidence, they are conclusive on appellate courts." *State v. Tuggle*, 284 N.C. 515, 520, 201 S.E. 2d 884, 887; *State v. McVay*, 277 N.C. 410, 417, 177 S.E. 2d 874, 878; *accord*, *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677; *State v. Smith*, 278 N.C. 476, 180 S.E. 2d 7; 1 Stansbury, N. C. Evidence (Brandidis rev.), § 57, pp. 176-77.

[1] There is ample evidence to support the finding of the trial court that the identification of defendant by Woody was based

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upon his face-to-face encounter in the restaurant and not upon any impermissible identification procedure. Woody testified that he observed defendant from a distance of twenty feet, then approached him, and finally grabbed him by the wrist. When reporting the incident to police authorities, he described defendant as being 5'9" tall, weighing 180 pounds, with dark brown skin. When presented with a lineup of ten photographs, he picked defendant promptly and without difficulty. The court properly admitted the evidence of Walter Woody which identified defendant.

[2] Defendant also assigns as error in connection with his identification by Woody the refusal of the court to permit cross-examination of Woody concerning the appearance of the skin color of individuals portrayed in the photographs used in the identification procedure. While a cross examiner has wide latitude in his examination, the court does have discretion to limit argumentative questioning—particularly about matters of which the witness can have only a speculative opinion. 1 Stansbury, N. C. Evidence (Brandis rev.), § 35, p. 108. Here Woody knew none of the persons whose pictures were presented to him. The exclusion of his evaluation of the shades of color demonstrated in the black and white photographs was not error.

[3] Defendant assigns as error the failure of the trial court to give specific instructions to the jury upon the legal effect of alibi evidence. He made no request for such instructions. Since *State v. Hunt*, 283 N.C. 617, 197 S.E. 2d 513, a defendant has not been entitled to alibi instructions absent a request. Defendant recognizes the *Hunt* rule but urges its abandonment. The weight of authority supports the holding of our Supreme Court in *Hunt*, and we adhere to that decision.

Other assignments of error which relate to the admission or exclusion of evidence and remarks of the trial judge have been carefully considered and are deemed to be without merit or harmless in effect.

Defendant has been accorded a fair hearing and must abide by the jury verdict.

No error.

Judges MORRIS and HEDRICK concur.

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STATE OF NORTH CAROLINA v. SAM EDWARD JONES

No. 748SC765

(Filed 20 November 1974)

1. Assault and Battery § 11—assault with rifle or shotgun—no material variance

In a prosecution for assault with a firearm on a law enforcement officer, assault with a firearm on an officer with intent to kill, and armed robbery, variance between the indictment charging use of a .16 gauge automatic rifle and evidence tending to show use of a .16 gauge automatic shotgun was not material.

2. Assault and Battery § 14; Robbery § 4—assault on law officers—armed robbery—sufficiency of evidence

Defendant's motion for directed verdict was properly denied in a prosecution for assault with a firearm on a law enforcement officer, assault with a firearm on an officer with intent to kill, and armed robbery where the evidence tended to show that defendant took pistols and a shotgun from officers at gunpoint, that he fired at cars in which other officers were seated as well as at ditches where they had taken cover, and that he wounded one officer in the leg.

3. Criminal Law §§ 80, 169—police reports of investigation

Trial court did not err in refusing cross-examination of two officers as to written reports filed by them and defendant was not entitled to examine the reports for possible inconsistencies with the testimony offered at trial where questions and answers placed in the record did not relate to any inconsistency between the reports and the officers' testimony at trial and where the record did not disclose any request for examination of the reports at trial or any pretrial motion setting out any reasonable ground for their production.

4. Robbery § 5—armed robbery—failure to submit lesser included offenses

Trial court did not err in failing to submit a lesser included offense in connection with the charge of armed robbery where all the evidence indicated that defendant was the original aggressor and deprived officers of their weapons at the point of a shotgun.

APPEAL by defendant from *Lanier, Judge*, 1 April 1974 Session of Superior Court held in WAYNE County.

Heard in Court of Appeals 21 October 1974.

Defendant was charged in five indictments with assault with a firearm on a law enforcement officer, in one indictment with assault with a firearm on a law enforcement officer with intent to kill, and in two indictments with armed robbery. He pleaded not guilty to all charges and was tried before a jury.

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Six law enforcement officers, victims of the offenses, testified for the State. About 1:00 a.m. on 21 February 1974, two Wayne County deputy sheriffs responded to a call at the defendant's residence on Highway 117. There they found defendant alone in the front yard holding a .16 gauge automatic shotgun. Defendant ordered the men to get out of their car and throw their weapons on the ground. As he reached into the patrol car to remove a shotgun from the front seat, the deputies fled across the road. Defendant called upon them to stop and fired the shotgun he had been holding. Two Goldsboro policemen arrived, and defendant fired again. Two more policemen arrived, shots were exchanged, and one policeman was wounded by shotgun pellets. Defendant then left, taking with him the deputies' pistols and shotgun. Later that day he turned himself in at the Wayne County jail and returned the pistols. Acting on information furnished by defendant, a deputy sheriff recovered the shotgun at a local discotheque.

Defendant and his mother testified that he had been drinking and was behaving violently and irrationally on the night in question. Defendant maintained that he shot at the officers and took their weapons while acting in self-defense.

The jury found defendant guilty on four of the five charges of assault with a firearm and guilty of the two charges of armed robbery. From judgments imposing sentences of three to five years in each assault case and 20 to 25 years in each robbery case, defendant appealed to this Court.

Attorney General James H. Carson, Jr., by Associate Attorney Alan S. Hirsch, for the State.

Herbert B. Hulse and George F. Taylor, for defendant appellant.

BALEY, Judge.

[1, 2] Defendant contends that the court should have allowed his motions for a directed verdict of not guilty upon all charges. He bases this contention on two grounds: (1) that there is no evidence that he fired at any particular officer and (2) that he fired a .16 gauge automatic shotgun when the indictment charges that he used a .16 gauge automatic rifle. The distinction between a rifle and a shotgun as the firearm involved is not a material variance. The indictments charged assault with a firearm, and clearly an automatic shotgun comes within that

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classification. See *State v. Banks*, 271 N.C. 583, 157 S.E. 2d 145; *State v. Dunlap*, 16 N.C. App. 176, 191 S.E. 2d 385. Testimony from all the officers who were engaged in the performance of their duty on this occasion showed that defendant shot at them. He took pistols and a shotgun from officers Sasser and Warrick, who were first on the scene, and fired at the cars in which other officers were seated as well as at ditches where they had taken cover. Officer Melvin was wounded in the leg. It seems clear that the evidence in its most favorable light for the State was sufficient to show every element of the offenses charged and to support the jury verdicts. The motions for a directed verdict were properly denied.

[3] Defendant assigns as error the refusal of the court to permit cross-examination of two of the officers about written reports which they had filed after their investigation. He now contends that he was entitled to examine these reports for possible inconsistencies with the testimony offered at trial. First of all, the questions asked and the answers placed in the record do not relate to any inconsistency in testimony. Defendant has suffered no prejudice from their exclusion as evidence. Second, the record does not disclose any request for examination of the reports at the trial nor any pretrial motion setting out any reasonable ground for their production. Reports of investigating officers are the work product of the prosecution, and there is no constitutional right to their examination.

“We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.”

Moore v. Illinois, 408 U.S. 786, 795 (1972). As the North Carolina Supreme Court stated so succinctly in *State v. Davis*, 282 N.C. 107, 111, 191 S.E. 2d 664, 667: “Defendant was not entitled to . . . a fishing expedition nor to receive the work product of police or State investigators.” See also *State v. Blue*, 20 N.C. App. 386, 201 S.E. 2d 548.

[4] The claim of defendant that the court should have instructed the jury upon a lesser included offense in connection with the charge of armed robbery is without merit. All the evidence indicates that defendant was the original aggressor and deprived the officers of their weapons at the point of a shotgun. The fact that defendant later had a change of heart and returned the weapons may have some bearing upon punish-

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ment, but it does not reduce the original armed robbery to a lesser offense. The necessity for charging on the crime of a lesser degree arises only when there is evidence from which the jury could find that a crime of lesser degree was committed. *State v. Davis, supra; State v. Bryant*, 280 N.C. 551, 187 S.E. 2d 111, *cert. denied*, 409 U.S. 995 (1972).

Other assignments of error pertain to the charge of the court. We have carefully reviewed the charge and conclude that when it is considered in its entirety it complies with the statute and is free from prejudicial error.

In the trial of this cause, we find no error.

No error.

Judges MORRIS and HEDRICK concur.

RUTH M. CHEEK AND BESSIE M. CHEEK v. MAE LANGE AND HAROLD EDWARD WILBANKS; MR. KIBBY AND WIFE, MRS. EDWINA KIBBY; TED WILBANKS AND WIFE, MRS. TED WILBANKS

No. 7429DC301

(Filed 20 November 1974)

1. Rules of Civil Procedure § 50— directed verdict— statement of grounds

A motion for a directed verdict must state the specific grounds therefor.

2. Rules of Civil Procedure § 50— motion for directed verdict — subsequent presentation of evidence — review on appeal

Where defendants presented evidence first and plaintiffs then moved for a directed verdict, validity of the trial court's denial is not presented for review since plaintiffs then introduced evidence and did not thereafter renew their motion.

3. Adverse Possession § 25.1— three parcels — instruction not limited to one parcel — prejudicial error

In an action to remove cloud on title to three tracts of property where defendants claimed ownership by virtue of adverse possession, the trial court's instructions which left the jury free to speculate that a successful showing of adverse possession of one tract would simultaneously demonstrate the same as to the remaining two was prejudicial.

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APPEAL by plaintiffs from *Gash*, Chief District Judge, 14 September 1973 Session of District Court held in TRANSYLVANIA County.

Civil action to remove cloud on title to real property. Plaintiffs alleged they are owners in fee simple of three tracts of land particularly described in the complaint by metes and bounds, and that defendants claim an adverse interest therein. Defendants answered, denying plaintiffs' title and alleging defendants own the lands described in the complaint by virtue of adverse possession exercised by them and their predecessor in title.

Plaintiffs' title rests upon a recorded deed dated 18 February 1932 from J. P. Hinkle and M. N. Hinkle. Defendants' claim rests upon a recorded deed dated 15 May 1944 from Mary Nancy Hinkle, who the parties agree was the widow of J. P. Hinkle and the same person denominated in plaintiffs' deed as M. N. Hinkle.

Following stipulation by the parties that the court, sitting without a jury, should determine the legal effect of the deeds in question, the court ruled that the 1932 deed was valid and operative to pass title to plaintiffs. Thereafter the case came on for trial before the jury on defendants' counterclaim asserting ownership by adverse possession. The jury returned verdict finding defendants the owners of and entitled to possession of the property described in the complaint by reason of adverse possession for seven years under color of title.

From judgment on the verdict, plaintiffs appealed.

Ramsey, White & Patterson by William R. White for plaintiff appellants.

Ramsey, Hill, Smart & Ramsey by Ralph H. Ramsey, Jr., for defendant appellee Mae Lange.

Hamlin & Potts by Jack H. Potts for defendant appellee Harold Edward Wilbanks.

PARKER, Judge.

The jury trial being solely upon defendants' counterclaim of adverse possession, defendants first presented evidence. At the close of defendants' evidence, plaintiffs "made a motion as of nonsuit," which was denied. The validity of this ruling is the first question which plaintiffs seek to present on this appeal.

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[1, 2] Since the adoption of our new Rules of Civil Procedure, G.S. Chap. 1A, the old motion "as of nonsuit" has been replaced by the motion for a directed verdict made under Rule 50(a), and we shall treat plaintiffs' motion as though it had been a motion for a directed verdict. Rule 50(a) contains the mandatory directive that "[a] motion for a directed verdict shall state the specific grounds therefor." *Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974); *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E. 2d 769 (1970). The record fails to show compliance with this directive. If this be overlooked, nevertheless the question which plaintiffs first seek to present on this appeal is not before us for review. After their motion made at the close of defendants' evidence was denied, plaintiffs introduced evidence and did not thereafter renew their motion. They thereby waived the motion previously made. *Woodard v. Marshall*, 14 N.C. App. 67, 187 S.E. 2d 430 (1972); 5A Moore's Federal Practice, ¶ 50.05 [1]; 9 Wright and Miller, Federal Practice and Procedure, § 2534(2).

[3] Plaintiffs assign error to the jury instructions, contending that the trial court erred when it assumed, throughout the charge, that evidence concerning defendants' adverse possession of one of the contested tracts of land would simultaneously indicate their claim of ownership of the other two. The evidence—although confusing in many respects because of the incompleteness of the record upon appeal—indicates that the property in question was, in fact, three distinct parcels of land separately described by metes and bounds in both the 1932 deed under which plaintiffs claim title and the 1944 deed which formed the basis of defendants' claim of seven years adverse possession under color of title. In such a situation, "possession of a single tract is not constructively extended to a separate and distinct tract even though both tracts are described in the same conveyance." *Bowers v. Mitchell*, 258 N.C. 80, 128 S.E. 2d 6 (1962). The trial court failed to instruct the jury upon this rule of law. This error, moreover, was prejudicial. For the most part, each piece of evidence introduced by defendants to prove their claim described some possessory act upon one rather than upon all of the three tracts; given this factual context, the jury was left free to speculate that a successful showing of adverse possession of one tract would simultaneously demonstrate the same as to the remaining two.

Shankle v. Shankle

For error in the charge, there must be a

New trial.

Chief Judge BROCK and Judge BAILEY concur.

WILLIAM T. SHANKLE (WIDOWER), AND WILLIAM K. SHANKLE, ADMINISTRATOR OF THE ESTATE OF ELI C. SHANKLE, DECEASED, PETITIONERS v. MISSIE G. SHANKLE (WIDOW), BRAXTON SHANKLE (DIVORCED), ALBERT SHANKLE AND WIFE, MRS. ALBERT SHANKLE, E. HERBERT SHANKLE, JR., AND WIFE, MRS. E. HERBERT SHANKLE, JR., NANNIE SHANKLE WILLIAMS AND HUSBAND, JOHN DOCK WILLIAMS, BOBBY SHANKLE (SINGLE), AND NEWNAN HOWARD SHANKLE AND WIFE, MRS. NEWNAN HOWARD SHANKLE, RESPONDENTS

No. 7420SC573

(Filed 20 November 1974)

Jury § 1—remand for jury trial

Special proceeding is remanded for trial by jury where all parties requested a jury trial almost two years prior to the time the case was called for trial and the requests were set out in the clerk's written order transferring the case to the civil issue docket for trial.

APPEAL by respondents from *Seay, Judge*, 25 February 1974 Session of Superior Court held in RICHMOND County.

Petitioners, claiming an interest in land as tenants in common with respondents, started this special proceeding to sell the land for division.

Petitioner, William T. Shankle, is one of the two children of Eli C. Shankle, and alleges that Eli was seized of the land at the time of his death in 1952. Respondents are the heirs of E. H. Shankle, the other child of Eli, who died intestate in 1969.

Respondents filed answer to the petition and alleged that petitioners own no interest in the land. Respondents claim exclusive ownership as heirs of E. H. Shankle to whom, respondents allege, Eli conveyed the land in 1943.

After respondents interposed the foregoing defense, the Clerk, on 30 March 1972, entered an order transferring the cause to civil issue docket for trial. Among other things, the Clerk's

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order recited that “. . . all of the parties hereto have requested a jury trial on the issues arising in this proceeding.”

When the case was called for trial in the Superior Court, respondents filed a written notice for continuance wherein they advised the court that they had employed counsel to represent them at trial but that counsel had withdrawn without prior notice to them. The court denied the motion for continuance. The court also denied respondents' motion for trial by jury. Trial proceeded before the court without a jury and without counsel for respondents. The court found the facts against respondents and concluded that petitioners owned one-half interest in the land. A sale for partition was ordered.

Benjamin D. Haines for petitioner appellees.

Jones & Deane by W. R. Jones and Charles B. Deane, Jr., for respondent appellants.

PARKER, Judge.

The principle of the right to trial by jury is basic to our system of jurisprudence and need not be reviewed here. “[T]rial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.” N. C. Const., art. 1, § 25. Prior to the adoption of the Rules of Civil Procedure a party could waive that right by written consent, oral consent entered in the minutes, or by failing to appear. Rule 38 added a fourth method of waiver, failing to serve a demand on the other parties within ten days after service of the last pleading directed to the issue. The last method “. . . has as its object the early ascertainment of those cases in which there will be no jury. This knowledge is useful in calendaring a case and in counsel's preparation for trial.” Comment, G.S. 1A-1, Rule 38, at p. 665.

Here the record discloses that *both* parties requested a trial by jury and their requests were set out in the order of the Clerk of Superior Court. Moreover, notwithstanding the failure of a party to demand a jury trial, the court in its discretion upon motion or of its own initiative may order a jury trial on any issue. G.S. 1A-1, Rule 39(b).

In view of the particular background of this case, which started as a special proceeding before the Clerk, where all parties requested a jury trial almost two years prior to the time

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the case was called for trial, and where these requests were set out in the Clerk's written order transferring the case to the civil issue docket for trial, we are of the opinion that the ends of justice will best be served by directing that the judgment be vacated and the case remanded for trial by jury.

The judgment from which respondents appeal is vacated and the case is remanded for trial by jury.

Vacated and remanded.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. CURTIS GEER, JR.

No. 747SC128

(Filed 20 November 1974)

1. Criminal Law § 102—solicitor's jury argument — supporting evidence

In this homicide prosecution, the solicitor's jury argument that defendant would also have killed a friend of deceased who was present at the shooting had his pistol contained additional bullets was supported by evidence that defendant had shot at deceased's friend as well as at deceased and that all the bullets in defendant's pistol were discharged.

2. Criminal Law § 112—presumption of innocence — failure to give tendered instruction

The trial court did not err in failing to give a tendered instruction "about the presumption of innocence surrounding the defendant and the continuation of the presumption throughout the course of the trial" where the court instructed the jury that defendant was presumed to be innocent and that the burden was on the State to prove him guilty beyond a reasonable doubt.

3. Criminal Law § 113—significance of failure to produce diagram — absence of instruction

The trial court did not err in failing to instruct the jury concerning the significance of the State's failure to produce a diagram which was part of the official investigative record where there was no evidence as to who had made the original diagram and whether it was accurately drawn.

4. Criminal Law §§ 46, 113—failure to define "flight"

The trial court in a homicide case did not err in failing to define the word "flight" in connection with the court's instruction on consideration of flight as evidence of guilt.

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APPEAL by defendant from *Webb, Judge*, July 1973 Criminal Session of Superior Court held in WILSON County.

By bill of indictment proper in form defendant was charged with the first-degree murder of one Billy Ray Dawson. Defendant pled not guilty. Jerome Thomas, a witness for the State, testified that he saw defendant shoot Dawson in the head with a pistol. There was evidence that Dawson died shortly thereafter as a result of the wound thus inflicted. Defendant admitted that he shot Dawson, but testified he did so in self-defense.

The jury found defendant guilty of second-degree murder, and from judgment imposing a prison sentence, defendant appealed.

Attorney General Morgan by Assistant Attorney General Sidney S. Eagles, Jr., and Associate Attorney E. Thomas Maddox, Jr., for the State.

William H. Holdford for defendant appellant.

PARKER, Judge.

[1] Defendant assigns error to the trial court's failure to sustain his objection to a portion of the solicitor's final argument to the jury in which the solicitor intimated that the defendant, had his pistol contained additional bullets, would have also killed Jerome Thomas, a friend of the deceased who was present at the shooting. We do not think, however, that in so ruling the trial court abused its discretion. The solicitor's speculation was well founded. There was evidence that the defendant shot at Thomas as well as at the deceased and that all the bullets in defendant's pistol were discharged. Furthermore, in this context, we find no prejudicial error when the trial judge, in denying defendant's motion, said, "Well, I believe there is some evidence of it." The trial court was simply being accurate.

[2-4] Defendant next assigns error to three portions of the court's charge to the jury. First, defendant contends that the court erred in ignoring that portion of his tendered request for jury instructions which moved the court to charge "about the presumption of innocence surrounding the defendant and the continuation of the presumption throughout the course of the trial." Although the court did not employ the exact words requested by defendant, the court did clearly instruct the jury that defendant was presumed to be innocent and that the bur-

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den was on the State to prove him guilty beyond a reasonable doubt. We find the instruction adequate and that defendant suffered no prejudicial error in the court's failure to further elaborate on the matter. Second, defendant contends that the trial court erroneously failed to instruct the jury concerning "the significance of the State's failure to produce a diagram which was part of the official investigative record." Again, there was no error. Although defense counsel had access to the investigative record at the trial, and appears to have made a copy of the diagram in question, there was no evidence as to who had made the original diagram or whether it was accurately drawn. Since the requisites for admissibility of the diagram were lacking, the defendant can hardly seek to penalize the State for failure to introduce it. Finally, defendant contends that the trial court erred in not defining the word "flight" in connection with the court's instruction that the jury might consider evidence of flight, "together with all other facts and circumstances in this case, in determining whether the combined circumstances amount to an admission or show a consciousness of guilt." Given the relatively simple facts of this case and the defendant's failure to ask the trial court for the definition he now contends should have been given, the court did not err in failing to define this word, which was being used in its common, everyday sense.

Other assignments of error noted in the record have not been brought forward in appellant's brief and are deemed abandoned. In defendant's trial and in the judgment appealed from we find

No error.

Chief Judge BROCK and Judge BAILEY concur.

STATE OF NORTH CAROLINA v. CLYDE WILLIAM JOHNSON

No. 7429SC620

(Filed 20 November 1974)

1. Criminal Law § 143—revocation of suspension—grounds for attack

A defendant who consents to the suspension of a sentence upon specified conditions may not attack an order putting the sentence

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into effect except on the ground that (1) there is no evidence to support a finding of a breach of the conditions of suspension, or (2) the condition which he has broken is invalid because it is unreasonable or is imposed for an unreasonable length of time.

2. Criminal Law § 143—revocation of suspension—sufficiency of evidence of violation of conditions

Evidence was sufficient to support the trial judge's conclusion that defendant breached the terms and conditions of his probation where such evidence included testimony by defendant that he was delinquent in installment payments ordered by the terms of the probation and testimony that he had been convicted of four offenses in violation of his probation terms.

ON WRIT of *certiorari* to review the order of *Martin (Robt. M.)*, Judge, at the 14 January 1974 Session of Superior Court held in McDOWELL County. Argued before the Court of Appeals 14 October 1974.

On 7 January 1970 defendant pleaded guilty to the offense of uttering a forged check. Defendant was sentenced to seven years imprisonment, and sentence was suspended for five years. Among the usual terms and conditions of probation were special conditions of probation: that defendant pay \$40.00 costs; that defendant reimburse one Phillip Lowery in the amount of \$31.00; that defendant pay a fine of \$1,000.00 in installments payable at the rate of \$50.00 per month. Another special condition stated:

“If the defendant violates any of the conditions of his probation or orders of his probation officer he will be subject to arrest upon order of the Court, or by the probation officer. At any time within the period of his probation, the Court may, if it sees fit, impose the Judgment and sentence it might have imposed in this first instance.”

On 6 August 1970 the probation order was modified as to the amount of the installment payments to be made by the probationer. No further modification was made. On 31 August 1973 the probation officer served a “bill of particulars” on probationer, notifying him that a report containing offenses alleged to constitute a violation of his probation would be submitted to the Superior Court of McDowell County. At the hearing Avery Ervin, the probation officer, stated that probationer had violated his probation terms and conditions by moving from Morganton to Martinsville, Virginia, without the prior written permission of his probation officer. Furthermore, probationer

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had been convicted of four offenses in violation of his probation terms and conditions: simple assault, failure to reduce speed to avoid an accident, uttering a worthless check in the amount of \$1,727.00, and driving under the influence of alcohol.

Probationer testified that he was having "a bad problem with alcohol during the times Mr. Ervin testified about, . . ." Probationer stated he was working his way out of his problem and asked the court for a second chance.

The Superior Court found that defendant had violated the terms and conditions of his probation, particularly the condition that he violate no penal law of any state, and entered orders which revoked probation and activated the original sentence of seven years' imprisonment. Defendant appealed.

Attorney General Carson, by Associate Attorney Brake, for the State.

Story & Hunter, by C. Frank Goldsmith, Jr., for the defendant.

BROCK, Chief Judge.

Defendant contends that the evidence contained in the record on appeal is insufficient to support the order of the trial court revoking probation and the order activating the suspended sentence. Defendant concedes that the suspension of an active sentence is a matter within the sound discretion of the trial court, but argues that the offenses committed were all misdemeanors and, when considered with the mitigating circumstances testified to at the hearing, constituted an insufficient basis for revocation of probation. We disagree.

[1] A defendant who consents to the suspension of a sentence upon specified conditions may not attack an order putting the sentence into effect "except: (1) On the ground that there is no evidence to support a finding of a breach of the conditions of suspension; or (2) on the ground that the condition which he has broken is invalid because it is unreasonable or is imposed for an unreasonable length of time." *State v. Caudle*, 276 N.C. 550, 553, 173 S.E. 2d 778. Defendant does not challenge the reasonableness of the condition that he violate no penal law of any state and limits himself solely to the first ground set forth above.

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Evidence sufficient to support a finding of breach of probationary conditions is that which reasonably satisfies "the judge, in the exercise of his sound discretion, that the defendant has violated a valid condition upon which the sentence was so suspended." *State v. Seagraves*, 266 N.C. 112, 113, 145 S.E. 2d 327. The evidence must be substantial and "of sufficient probative force to generate in the minds of reasonable men the conclusion that defendant has in fact breached the condition in question." *State v. Millner*, 240 N.C. 602, 605, 83 S.E. 2d 546.

[2] We find that there is substantial evidence in the record to support the trial judge's conclusion that defendant breached the terms and conditions of his probation. Defendant himself took the stand and testified that he was delinquent in the installment payments ordered by the terms of the probation, and further admitted that he had been convicted of the offenses about which his probation officer had testified. Defendant's contention that these are "technical" violations insufficient to support revocation of probation and activation of the suspended sentence is untenable and without merit. The evidence is clearly sufficient to support the trial court's orders. This assignment of error is overruled.

We decline to consider a second argument advanced by defendant in his brief. The argument is supported neither by an exception nor an assignment of error. In our opinion the orders entered by the trial court were correct and were supported by substantial evidence.

Affirmed.

Judges BRITT and PARKER concur.

DEVOE CARSON v. BEATRICE KENNEDY CLONINGER

No. 7427SC564

(Filed 20 November 1974)

Landlord and Tenant § 8—repair of premises—duty of landlord absent covenant

The landlord is under a duty to exercise reasonable care in the actual repair of leased premises regardless of a covenant to repair;

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therefore, the trial court erred in granting defendant landlord's motion for summary judgment in an action by lessee to recover for injuries sustained when she fell through her porch where the evidence tended to show that defendant had remodeled the porch before plaintiff's fall.

APPEAL by plaintiff from *Snepp, Judge*, 25 February 1974 Session of GASTON Superior Court. Heard in the Court of Appeals on 22 October 1974.

Plaintiff instituted this action to recover damages for personal injuries sustained on or about 18 June 1970 when she fell through her porch. At the time of the accident, plaintiff was renting the premises from defendant. Defendant moved for summary judgment, and in ruling on the motion, the trial court considered the pleading and depositions of each party. From an order granting defendant's motion for summary judgment, plaintiff appealed.

Chambers, Stein, Ferguson & Lanning, by James C. Fuller, Jr., for plaintiff appellant.

Hollowell, Stott & Hollowell, by Grady B. Scott and James C. Windham, for defendant appellee.

MARTIN, Judge.

Summary judgment is proper only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a party is entitled to a judgment as a matter of law. G.S. 1A-1, Rule 56(c). When motion for summary judgment is made, the court must look at the record in the light most favorable to the party opposing the motion. *Patterson v. Reid*, 10 N.C. App. 22, 178 S.E. 2d 1 (1970). The party moving for a summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972).

While the record in this case is somewhat confusing, if not conflicting, it tends to show the following when viewed in the light most favorable to plaintiff. In 1969 defendant-landlord made extensive repairs to the premises, but failed to complete repairs to the porch in question. Plaintiff had told defendant she wanted the porch "all fixed over" and "the whole thing remodeled." Defendant's deposition indicates that the porch in

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question was remodeled with a new floor. Furthermore, this new floor was laid before plaintiff fell through the porch causing serious injury to her back. While there is some ambiguity as to whether the particular portion of the porch where plaintiff fell through had been remodeled by defendant, the record, viewed in a light favorable to plaintiff, indicates it had been remodeled.

Assuming plaintiff fell through a part of the porch which defendant had allegedly remodeled in a negligent manner, there remains a question of law as to whether defendant-landlord has thereby breached any legal duty owed to plaintiff. Plaintiff advances three theories to support a recovery for personal injuries. The first two theories are without merit. In the third theory, plaintiff contends that defendant is liable for injuries resulting from negligent repairs of the porch even though such repairs were done absent a covenant to repair. We have found no North Carolina case where a landlord negligently repairs the premises, with a resulting injury to the tenant, but in the absence of a covenant to repair. See 38 N.C. L. Rev. 403 (1960). In *Mercer v. Williams*, 210 N.C. 456, 187 S.E. 556 (1936), the Court states:

"The general rule is, that a landlord is not liable to his tenant for personal injuries sustained by reason of a defective condition of the demised premise, unless there be a contract to repair which the landlord undertakes to fulfill and does his work negligently to the injury of the tenant. *Fields v. Ogburn*, *supra*; *Colvin v. Beals*, 187 Mass. 250 (sic)."

However, *Mercer* involves the negligent *failure* to repair leased premises in breach of a covenant to repair, and, therefore, it is unlikely the Court intended to set out a rule covering the present case. *Livingston v. Investment Co.*, 219 N.C. 416, 14 S.E. 2d 489 (1941), involves negligent repair by an agent of the landlord pursuant to an agreement to repair, but the Court quotes several authorities which expressly repudiate the significance of a covenant to repair where repairs were negligently performed. The prevailing rule places a duty upon the landlord to exercise reasonable care in the actual repair of leased premises regardless of a covenant to repair. 49 Am. Jur. 2d, Landlord And Tenant, § 795, p. 746; Annot. 150 A.L.R. 1373 (1944); William L. Prosser, Handbook of the Law of Torts, § 63, pp. 410-411 (4th ed. 1971). There are several variations of this rule, but a discussion thereof is not relevant to this appeal.

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Since there appears to be a genuine issue as to a material fact and defendant is not entitled to judgment as a matter of law, we hold it was error to grant defendant's motion for summary judgment.

Reversed.

Chief Judge BROCK and Judge PARKER concur.

HOUSING AUTHORITY OF THE CITY OF ASHEVILLE, APPELLANT v. CARLOS F. PELAEZ, SR., UNMARRIED; OSWALD PELAEZ AND WIFE, POLLY ANN PELAEZ; CARLOS F. PELAEZ, JR., (ALSO KNOWN AS CHARLES F. PELAEZ), UNMARRIED; JESSIE LEE SURRENCY (FORMERLY JESSIE LEE PELAEZ), UNM.; THE HEIRS, DEVISEES, LEGAL REPRESENTATIVES OR ASSIGNEES OF JOHN C. PATTERSON, DECEASED, AND THE SPOUSE OF EACH, IF ANY; THE HEIRS, DEVISEES, LEGAL REPRESENTATIVES OR ASSIGNEES OF AMELIA GALLOWAY OVERTON, DECEASED, AND THE SPOUSE OF EACH, IF ANY; THE HEIRS, DEVISEES, LEGAL REPRESENTATIVES OR ASSIGNEES OF RICHARD BUXTON OVERTON, SR., DECEASED, AND THE SPOUSE OF EACH, IF ANY; ELEANOR SMALL OVERTON, WIDOW; RICHARD B. OVERTON, JR., AND WIFE, CAROLYN OVERTON; NANCY OVERTON RICE AND HUSBAND, GUY RICE; STATE OF N. C., DEPT. OF REVENUE; ALL OTHER PERSONS, FIRMS OR CORPORATIONS WHO NOW HAVE OR CLAIM OR WHO MAY HEREAFTER CLAIM ANY RIGHT, TITLE, INTEREST OR ESTATE IN AND TO THE PROPERTY DESCRIBED IN EXHIBIT "B" OF THE PETITION FOR CONDEMNATION FILED IN THIS PROCEEDING, WHETHER SANE OR INSANE, ADULT OR MINOR, *in esse* OR NOT *in esse* OR *en ventre sa mere*, RESIDENT OR NON-RESIDENT OF THE STATE OF N. C., LIVE CORP. OR DISSOLVED CORP., APPELLEES

No. 7428SC779

(Filed 20 November 1974)

Attorney and Client § 7— attorney fee in condemnation proceeding — reasonableness — sufficiency of findings

Trial court's conclusion that \$1900 was a reasonable fee for respondent's attorneys was not based on findings of fact supported by competent evidence.

APPEAL by petitioner from *McLean, Judge*, 24 June 1974 Session of Superior Court held in BUNCOMBE County. Heard in the Court of Appeals on 17 October 1974.

This is an appeal from an order awarding counsel fees, to be taxed as part of the costs, for the attorneys for Jessie Lee Surrency, one of the respondents in a condemnation proceeding

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filed by the petitioner, Housing Authority of the City of Asheville.

A substantial number of the parties respondent filed answer to the petition, including respondent Surrency. Commissioners were appointed by the Clerk of Superior Court of Buncombe County to determine the value of the land to be taken and the commissioners filed a report awarding compensation to the respondents in the sum of \$42,000.00. Petitioner deposited this sum, plus interest, with the clerk of superior court, and the clerk signed and filed an order vesting the petitioner with fee simple title to and possession of the real estate in question. Thereafter, the clerk signed and filed a judgment confirming the report and award of the commissioners. No exceptions to the report of the commissioners of appraisal were filed by any of the parties respondent, and no appeal from the confirmation of such report of the commissioners was taken by any of the parties respondent. The clerk of superior court transferred the cause to the superior court in order to determine which of the parties respondent was entitled to the money deposited by the petitioner. On 27 June 1974, Judge McLean, sitting without a jury, determined the rights of the various respondents to the money.

Cecil C. Jackson, Jr. represented respondent Surrency throughout all of the proceedings. At the conclusion of the hearing on the issue of withdrawal of the deposited money, upon the motion and affidavit of Cecil C. Jackson, Jr. and upon hearing the arguments of counsel, the court entered and filed an order allowing the sum of \$1,900.00 to Narvel J. Crawford and Cecil C. Jackson, Jr. as counsel fees for their representation of respondent Surrency. The order, entered on 27 June 1974, reads in pertinent part as follows:

“[A]nd it appearing to the Court that Narvel J. Crawford and Cecil C. Jackson, Jr. represented and appeared in behalf of the respondent, Jessie Lee Surrency, in all of the nine Special Proceedings, and that they have not received any compensation from the said respondent, and did not agree inasmuch as the petitioner is taxed with the costs of the attorneys [sic] fees for the said respondent; and that said attorneys have done many legal services and performed extensive work in all of the above nine Special Proceedings on behalf of Jessie Lee Surrency.

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WHEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that Narvel J. Crawford and Cecil C. Jackson, Jr. be allowed the sum of \$1900.00 as attorneys [sic] fees in the above captioned nine Special Proceedings, and that this total amount of attorneys [sic] fees is taxed as the costs in the above action."

Petitioner appealed.

Redmond, Stevens, Loftin & Currie, P.A., by Walter L. Currie and Anthony Redmond for petitioner appellant.

Cecil C. Jackson, Jr. for respondent appellee.

HEDRICK, Judge.

The only issue before us on this appeal is whether the court erred in fixing counsel fees in the amount of \$1900.00 to be taxed as part of the costs and paid by petitioner to attorneys Narvel J. Crawford and Cecil C. Jackson, Jr. for their representation of respondent Surrency.

The statutory authority upon which the allowance of attorney fees in this case is based is G.S. 160A-503(2), which provides as follows:

"[I]f the power of eminent domain shall be exercised under the provisions of this Article, the property owner or owners or persons having an interest in property shall be entitled to be represented by counsel of their own selection and their *reasonable* counsel fees fixed by the court, taxed as a part of the costs and paid by the petitioners." (Emphasis ours.)

When a statute provides for attorney fees to be awarded as a part of the costs to be paid by the governmental authority which is appropriating the property, it is to be an amount equal to the actual reasonable value of the attorney's services. *Redevelopment Comm. v. Hyder*, 20 N.C. App. 241, 201 S.E. 2d 236 (1973). In *Redevelopment Comm. v. Hyder*, *supra* at 246, Judge Baley enumerated the factors to be considered by the court in fixing reasonable attorney fees as follows: "—the kind of case, the value of the properties in question, the complexity of the legal issues, the time and amount involved, fees customarily charged for similar services, the skill and experience of the attorney, [and] the results obtained"

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Petitioner contends that the order appealed from does not contain findings of fact based on competent evidence sufficient to support the court's conclusion that \$1900.00 was a reasonable fee for respondent's attorneys in this proceeding. We agree. When this case was argued in this court, counsel for respondent conceded that his affidavit filed in support of the motion was not correct in stating "that it was necessary for her [Jessie Lee Surrency] to defend herself by her attorneys, the undersigned petitioners [Cecil C. Jackson, Jr. and Narvel J. Crawford], pending the outcome of actions involving all eight of the above-mentioned proceedings [and] [t]hat it was necessary for the said respondent, Jessie Lee Surrency, to file appropriate response in the above eight parcels of property." Mr. Jackson further conceded that the finding in the court's order "that said attorneys have done many legal services and performed extensive work in all of the above nine Special Proceedings on behalf of Jessie Lee Surrency" was also incorrect. The record before us clearly shows that only one proceeding was involved in the motion to have the counsel fees fixed by the court. Suffice it to say, therefore, a material fact found by Judge McLean is not supported by competent evidence. Furthermore, neither the record nor the findings of fact support the conclusion that \$1900.00 is a reasonable fee to be taxed as a part of the costs and paid by petitioner to the attorneys representing respondent Jessie Lee Surrency. *Redevelopment Comm. v. Hyder, supra*.

The order is vacated, and the proceeding is remanded to the superior court for a new hearing in accordance with this opinion.

Vacated and remanded.

Judges MORRIS and BALEY concur.

VALUE HOMES, INC. v. MAMIE HARRIS

No. 749DC766

(Filed 20 November 1974)

Rules of Civil Procedure § 60—amended complaint not personally served on defendant—judgment valid—motion to set aside denied

Where an amended complaint was duly filed by the plaintiff pursuant to a valid order of the court and a copy thereof was delivered

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to defendant's attorney of record, defendant's contention that the trial court's judgment was void because the amended complaint was not personally served upon her is without merit, and she is not entitled to have that judgment set aside pursuant to Rule 60(b) (4).

APPEAL by defendant from *Allen, Judge*, 10 June 1974 Session of District Court held in GRANVILLE County. Heard in the Court of Appeals on 17 October 1974.

This is an appeal from an order denying defendant's motion to be relieved from a final judgment entered in the cause wherein plaintiff, Value Homes, Inc., sought to recover from defendant, Mamie Harris, \$4,600.00 for the alleged unjust enrichment of defendant by plaintiff in mistakenly constructing a house on defendant's land.

The following facts are not controverted: Plaintiff instituted this action in Granville County on 6 July 1964 by the filing of a verified complaint and the issuance of a summons. On 7 July 1964, the defendant was served with a copy of the original complaint and a summons by the Sheriff of Wake County. On 13 November 1964, defendant filed a verified answer to plaintiff's complaint. The answer noted that W. M. Hicks was the attorney of record for defendant. Later, however, due to the illness of Hicks, Hugh M. Currin was associated as attorney of record for defendant. On 21 November 1966, Mr. Currin appeared on behalf of the defendant in the Superior Court of Granville County and demurred ore tenus to the plaintiff's complaint. Judge W. A. Johnson sustained the demurrer but allowed plaintiff thirty days in which to file an amended complaint. On 19 December 1966, within the time allowed, plaintiff filed an amended complaint and delivered a copy of the amended complaint to Hugh M. Currin, the defendant's attorney of record. The defendant did not file answer to the amended complaint; but her attorney of record, Hugh M. Currin, continued to discuss from time to time the possibility of settlement with plaintiff's attorney. No settlement was reached, and the case was calendared for trial for the week of 4 June 1973. On 7 June 1973, upon his motion, Mr. Currin was allowed to withdraw as defendant's attorney. On the same date the court entered judgment in the case for plaintiff in the amount of \$4,600.00. After receiving notice of the execution sale of her lot, the defendant, on 1 March 1974, filed this motion to set aside the judgment.

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After a hearing on the motion, the court made findings of fact substantially as set out above and made the following pertinent conclusions of law:

"That upon service of the original Complaint and summons upon the defendant, Mamie Harris, on July 7, 1964, the Court gained jurisdiction over the parties and subject matter of this cause."

"That delivery of a copy of the Amendment to Complaint to Hugh M. Currin, attorney of record for the defendant, constituted service of Amendment to Complaint upon the defendant, Mamie Harris, and that the former Rules of Civil Procedure, former Rules of Court and the Order entered by the Honorable W. A. Johnson on November 21, 1966, in this cause required no further service of said Amendment to Complaint."

From an order denying the motion, defendant appealed.

Royster & Royster by S. S. Royster for plaintiff appellee.

Kirk & Ewell by John E. Tantum for defendant appellant.

HEDRICK, Judge.

Defendant's motion to set aside the judgment dated 7 June 1973 was made pursuant to G.S. 1A-1, Rule 60(b) (4), which in pertinent part provides:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

* * *

(4) The judgment is void; * * *"

Defendant argues that the judgment is void because the amended complaint was not personally served upon the defendant. We do not agree. The record before us shows conclusively that the court had jurisdiction to enter the order dated 21 November 1966 allowing plaintiff thirty days within which to file an amended complaint. We are aware of no statute or legal precedent antedating the rules of civil procedure effective 1 January 1970 which required that an amended complaint filed pursuant to a valid order of the superior court be served personally on the defendant by an officer or otherwise. The record and

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the unchallenged findings of fact made by the trial judge show clearly that the amended complaint was duly filed by the plaintiff pursuant to a valid order of the court and that a copy thereof was delivered to the defendant's attorney of record. Defendant's failure to file answer or otherwise defend herself against the proceeding did not divest the court of jurisdiction to proceed to judgment. Defendant has failed to show that the judgment is void or that she is in any way entitled to be relieved therefrom pursuant to Rule 60(b) (4).

Affirmed.

Judges MORRIS and BALEY concur.

STATE OF NORTH CAROLINA v. RALPH EDWARD ELLERBE

No. 7412SC767

(Filed 20 November 1974)

Robbery § 4—armed robbery—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for armed robbery of a convenience store.

APPEAL by defendant from *Smith, Judge*, 22 June 1974 Session of Superior Court held in CUMBERLAND County. Heard in the Court of Appeals on 21 October 1974.

This is a criminal prosecution wherein the defendant, Ralph Edward Ellerbee, was charged in a bill of indictment, proper in form, with armed robbery. The jury returned a verdict of guilty as charged, and the court sentenced the defendant to a prison term of thirty (30) years. Defendant appealed.

Attorney General James H. Carson, Jr., by Assistant Attorney General George W. Boylan for the State.

Gadsden and Swindell by Mitchel E. Gadsden for defendant appellant.

HEDRICK, Judge.

The sole question for resolution on this appeal is whether the trial court erred in denying defendant's timely motions for judgment as of nonsuit.

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Ted O. Rhodes appeared at the trial as a witness for the State and testified that on 7 July 1971 he was the president of J & C Sales, Inc., which operated a convenience store in Fayetteville, N. C. At 9:45 p.m. that night, while Rhodes was working at the store, the defendant and another man came into the store, each carrying a pistol. The defendant ordered Rhodes to open the cash register and give him all the money in it. Rhodes had difficulty opening the cash register, and defendant said to him: "I am going to count to three; if you don't have that cash register open by the time I count to three, I am going to kill you." When Rhodes continued to have trouble in opening the cash register, the defendant moved to within a few inches of him and attempted to open the drawer. Rhodes finally succeeded in opening the cash register and gave the defendant \$518.16 in cash. Defendant took the money, jerked the store telephone out of the wall, and ran out of the store.

Robbery at common law is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear. *State v. Lawrence*, 262 N.C. 162, 163, 136 S.E. 2d 595, 597 (1964). Armed robbery adds the requirement that the robbery must be "with the use or threatened use of [a firearm] . . . whereby the life of a person is endangered or threatened . . ." G.S. 14-87. Viewing the testimony of Rhodes in the light most favorable to the State, it is clear that the evidence is sufficient to require submission of the case to the jury and to support a conviction for robbery with a firearm.

In this trial, we find no error.

No error.

Judges MORRIS and BAILEY concur.

STATE OF NORTH CAROLINA v. LESTER BURNS HARGETT

No. 7426SC753

(Filed 20 November 1974)

1. Criminal Law § 114—reference to State's contention in instructions—
no expression of opinion

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injuries, the trial court did not express an

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opinion in making reference several times in its instruction to the State's contention that the victim had been shot in the back two times.

2. Criminal Law § 122—additional instructions on intent—necessity for repetition of self-defense instructions

The trial court did not err in failing to repeat its instructions on self-defense when the jury asked for and received additional instructions on the element of intent.

APPEAL by defendant from *Martin, Judge (Robert M.)*, 11 March 1974 Session of Superior Court held in MECKLENBURG County. Heard in the Court of Appeals on 15 October 1974.

This is a criminal prosecution wherein the defendant, Lester Burns Hargett, was charged in a bill of indictment, proper in form, with assault with a deadly weapon with intent to kill inflicting serious injuries by shooting Clyde Randy Chavis in the back two times. The defendant entered a plea of not guilty and the State offered evidence tending to establish the following:

On 17 July 1973, Mr. Clyde Randy Chavis encountered a pickup truck parked in the middle of the road as he was trying to leave the Oak Grove Trailer Park in Charlotte, N. C., where he lived. Since he was unable to pass, he got out of his car and knocked on the door to the trailer nearest the pickup truck. Mr. Ronnie Franklin Crimminger, a friend of Mr. Chavis, answered the door and told Mr. Chavis that the pickup truck belonged to the defendant, who was visiting Mr. Crimminger. When Mr. Chavis asked the defendant to move the truck, the defendant became angered and shot Mr. Chavis twice in the back with a pistol as Mr. Chavis was returning to his car.

The defendant testified in his own behalf and contended that Mr. Chavis had threatened him with a knife and that he fired the pistol in self-defense.

The jury found the defendant guilty as charged, and the trial court sentenced the defendant to a prison term of not less than nine (9) nor more than ten (10) years. The defendant appealed.

Attorney General James H. Carson, Jr., by Assistant Attorney General Roy A. Giles, Jr., for the State.

Alexander Copeland III for defendant appellant.

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HEDRICK, Judge.

[1] The defendant first contends that the trial court expressed an opinion in its charge to the jury. He asserts that "the Court's repeated reference to the alleged victim's having been shot in the back two times implied to the jury that the fact that the alleged victim had been assaulted by being shot twice in the back was not in controversy." The instructions embraced within the exceptions upon which this assignment of error is based cover approximately four pages in the record. The bill of indictment charged that the defendant feloniously assaulted Mr. Chavis with intent to kill "by shooting him twice in the back" We cannot perceive how the trial court could have adequately instructed the jury in this case without referring several times to the State's contention that the victim had been shot in the back two times. An examination of the entire charge fails to reveal that the judge in any way expressed an opinion on the evidence in violation of G.S. 1-180. This assignment of error has no merit.

[2] The defendant further assigns as error the failure of the trial court to repeat its instructions on self-defense when the jury asked for additional instructions on the element of intent. The defendant concedes that the court's instructions on self-defense and intent were correct. He asserts, however, that since self-defense and intent both relate to the defendant's state of mind, the court should have repeated its instructions on self-defense when the jury requested further instructions as to intent. We do not agree. When the trial judge has complied with a request by the jury for additional instructions on a particular point in the case, it is not incumbent on him to repeat his instructions as to other features of the case already correctly given. *State v. Dawson*, 278 N.C. 351, 180 S.E. 2d 140 (1971); *State v. Murray*, 216 N.C. 681, 6 S.E. 2d 513 (1940). This assignment of error is overruled.

The defendant had a fair trial free from prejudicial error.

No error.

Judges MORRIS and BAILEY concur.

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STATE OF NORTH CAROLINA v. JAMES EARL DAWSON

No. 748SC800

(Filed 20 November 1974)

1. Searches and Seizures § 1—seizure without warrant—article in plain view in car

A paper bag and its contents of lottery tickets and money were properly seized from defendant's car without a warrant where defendant was arrested for assault with a deadly weapon, defendant requested that an officer take his automobile to the police station, when the officer entered the car he saw a paper bag on the floorboard and through the open top of the bag saw currency and envelopes with numbers on them, and the officer suspected that the bag contained lottery paraphernalia.

2. Gambling § 3—promoting lottery—sufficiency of evidence

The State's evidence was sufficient for the jury on the issue of defendant's guilt of promoting a lottery in violation of G.S. 14-290 where it tended to show that lottery tickets were found on the floorboard of the car defendant was driving.

3. Criminal Law § 138—sentencing hearing—hearsay testimony—reputation as heroin dealer

The trial court did not err in allowing hearsay testimony of defendant's reputation for dealing in heroin at defendant's sentencing hearing upon his conviction for promoting a lottery since wide latitude is given the trial court in the sources and types of evidence which may be considered in determining punishment.

APPEAL by defendant from *Webb, Special Judge*, 29 April 1974 Session of Superior Court held in WAYNE County.

Defendant was charged in two warrants, one for promoting a numbers lottery in violation of G.S. 14-290 and the other for selling lottery tickets in violation of G.S. 14-291.1.

Defendant was originally arrested by police pursuant to an outstanding warrant for assault with a deadly weapon. Shortly after defendant was arrested, an officer saw lottery paraphernalia in the automobile that defendant was driving at the time of the arrest. The officer had entered the automobile with defendant's permission in order to remove it from the street. Defendant offered no evidence.

The jury found defendant guilty of promoting a lottery. He was found not guilty of the charge of selling lottery tickets. Judgment imposing an active six months' sentence was entered.

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Attorney General James H. Carson, Jr., by Associate Attorneys C. Diederich Heidgerd and Robert W. Kaylor, for the State.

R. G. Braswell for defendant appellant.

VAUGHN, Judge.

[1] Defendant contends that the court erred in denying his motion to suppress evidence of the paper bag and its contents of lottery tickets and money found in defendant's car. He contends that the contents of the bag should not have been admitted into evidence because they were obtained by an unreasonable search.

In a *voir dire* examination, the court made the following relevant findings of fact which are supported by competent evidence. On 1 September 1972, police officers stopped defendant pursuant to a warrant for assault with a deadly weapon. Defendant requested that one of the officers take the automobile defendant was driving to the police station. When the officer entered the automobile "he saw on the righthand floorboard a paper bag which was open at the top and which was showing currency and envelopes with numbers written on them." Defendant had a reputation for involvement in lotteries and the officer was suspicious that the contents of the bag were lottery paraphernalia. After consulting with his superior, the officer returned to the car and seized the bag and its contents. Based upon this, the court concluded that the officer "... could see the contents of the paper bag without opening it and that under these conditions no search warrant was necessary for him to take the bag and its contents." Defendant's motion to suppress the evidence was denied and the contents of the bag were admitted into evidence.

Evidence obtained by unreasonable search is inadmissible in the courts. However, "... the constitutional guarantee against unreasonable search and seizure does not prohibit the seizure and introduction into evidence of contraband materials when they are in plain view and require no search to discover them [citations]." *State v. Allen*, 282 N.C. 503, 507, 194 S.E. 2d 9, 13.

Here, there is sufficient evidence that defendant gave the officer permission to enter the automobile and that while in the automobile, the officer, without any search, observed the bag

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and its contents. For this and other reasons, the seizure of the bag and its contents was proper and the contents of the bag were properly admitted into evidence. *See State v. Allen, supra.*

[2] Defendant asserts that the court erred in denying his motion to dismiss at the close of the State's evidence. Under G.S. 14-290, possession of lottery tickets is prima facie evidence of the violation of this section. It is not necessary that defendant be in actual physical possession of the lottery tickets, and they need not be found on defendant's person. It is sufficient if they are found within his custody and control and subject to his disposition. *State v. Jones*, 213 N.C. 640, 197 S.E. 152. Here, the tickets were on the floorboard of the automobile which defendant was driving. Defendant had sufficient custody and immediate power of control to constitute the possession thereof. The evidence was sufficient to support the inference that the tickets were those used in the operation of a lottery. The evidence, therefore, was sufficient to take the case to the jury.

[3] Defendant asserts that the court erred in allowing hearsay testimony against defendant's character at a sentencing hearing. The testimony related to defendant's reputation for dealing in the heroin traffic. Defendant was given full opportunity to cross-examine and to discredit the testimony. "A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *State v. Pope*, 257 N.C. 326, 335, 126 S.E. 2d 126, 133. Different evidentiary rules govern trial and sentencing procedures. Wide latitude is given the trial judge in the sources and types of evidence he may consider to help him determine the kind and extent of punishment that should be imposed. The assignment of error is overruled.

Careful consideration of each of defendant's assignments of error leads us to the conclusion that he has had a fair trial, free from prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

Insurance Co. v. Insurance Co.

UTICA MUTUAL INSURANCE COMPANY v. CANAL INSURANCE COMPANY

No. 7418SC530

(Filed 20 November 1974)

1. Insurance § 90—automobile liability insurance—exclusion of leased vehicles—no violation of Vehicle Financial Responsibility Act

Provision in defendant's policy which excluded insurance on the liability of those operating under lease from defendant's insured was not void for violation of the Financial Responsibility Act, and defendant was therefore not liable to plaintiff, lessee's insurer, for damages paid by it when an employee of lessee negligently caused damage to a building while operating the leased vehicle.

2. Insurance § 80—Vehicle Financial Responsibility Act—purpose

The primary purpose of the Financial Responsibility Act is to assure that innocent victims of financially irresponsible motorists are compensated, not to protect a tort-feasor from liability for the loss he causes.

APPEAL by plaintiff from *Long, Judge*, 4 February 1974 Session of Superior Court held in GUILFORD County.

This is an action to recover damages paid and expenses incurred by plaintiff, Utica Mutual Insurance Company, in settlement of a claim arising out of the use of a 1963 Ford truck owned by Leo's Trailer Rental. Leo's leased the truck to Dixie Bedding Company, Inc. The lease provided that the lessee, Dixie, would pay all damages arising out of the use of the vehicle. While operating the truck, an employee of Dixie negligently caused damage to a building owned by Kallam Oil Company, Inc.

Kallam instituted a suit for the damage to its building against Dixie. Dixie forwarded the suit papers to Utica, its insurance carrier. Utica then made demand upon defendant, Canal Insurance Company, insurer of Leo's, to defend the suit. Canal denied that its policy extended coverage to lessees of its insured and refused to defend. Utica retained counsel on behalf of Dixie and negotiated a settlement with Kallam in the amount of \$5,500.00. Utica paid the judgment, plus court costs of \$19.00 and attorneys fees of \$400.00, which it now seeks to recover from Canal.

The facts were stipulated. The judge concluded as a matter of law that Utica was not entitled to recover against Canal and entered judgment accordingly.

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Smith, Moore, Smith, Schell & Hunter by David M. Moore, II, for plaintiff appellant.

Henson, Donahue & Elrod by Perry C. Henson for defendant appellee.

VAUGHN, Judge.

Utica contends that Canal's policy to Leo's is an owner's policy and by statute is required to afford primary coverage to those operating the truck with Leo's permission. An endorsement, E-45, on Canal's policy provided that the policy afforded no insurance to anyone using the vehicle under lease from Leo's and further provided that when the vehicle was leased to another, the insurance afforded Leo's would be excess over any other insurance.

Utica's policy with Dixie is a comprehensive liability policy covering liability arising out of the ownership, maintenance and use of motor vehicles. The advance premium stated in the declarations is only an estimate and provision is made for calculation of the earned premium upon termination of the policy. Among other things, the policy establishes a premium rate of five percent of the "cost of hire" involved in the use of vehicles rented by Dixie. The five percent rate is contingent upon a provision that the owner of the rented vehicle shall have purchased insurance covering the interest of Dixie on a direct primary basis and submitted evidence of that insurance to Dixie. The policy also provides that the insurance with respect to loss arising out of the use of any hired vehicle "insured on a cost of hire basis" is "excess insurance over any other valid and collectible insurance."

An insurance policy is a contract between insurer and insured. Utica contracted with Dixie to insure its liability arising out of the use of the vehicle it leased from others. Canal's contract with Leo's expressly provided it would not insure the liability of the lessee (Dixie). Thus, by express exclusion, Canal's policy with Leo did not provide "other valid and collectible insurance" to Dixie for its liability arising out of the use of a hired vehicle. Moreover, it is highly questionable whether, on this record, there is a showing that the hired vehicle involved in this loss was one insured by Utica on a "cost of hire basis" and thus it is questionable whether Utica is in a position to invoke the excess coverage only clause in its policy with Dixie.

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[1] We ground our decision, however, upon a rejection of Utica's basic argument. Utica contends that the provision in Canal's policy which excludes insurance on the liability of those operating under lease from Canal's insured is void and that, since the alleged exclusion is void, Canal's policy with Leo's provides primary coverage for Dixie's liability. Utica argues that the exclusionary clause is void on the grounds that it violates the motor vehicle Safety and Financial Responsibility Act, G.S. 20-279.1, *et seq.*, and G.S. 20-281, which makes it unlawful to engage in the motor vehicle leasing business without first securing insurance on the liability of both owner and lessee.

[2] The primary purpose of the Financial Responsibility Act is to assure that innocent victim of financially irresponsible motorists are compensated. *Nationwide Mutual Insurance Company v. Aetna Life and Casualty Company*, 283 N.C. 87, 90, 194 S.E. 2d 834, 837. Here, Kallam, the victim, has received the benefit of liability insurance as contemplated by the Act. "The requirements for a motor vehicle liability policy may be fulfilled by the policies of one or more insurance carriers which policies together meet such requirements." G.S. 20-279.21(j). As in *Continental Cas. Co. v. Weeks*, 74 So. 2d 367, which was quoted with approval in *Allstate Ins. Co. v. Shelby Mutual Ins. Co.*, *et al*, 269 N.C. 341, 152 S.E. 2d 436:

" 'There is no basis in the record before us for the conclusion that public policy will be violated by the enforcement of . . . [the exclusionary clause] . . . although we cannot and do not hold that this will be true in every case. For aught that appears here, sufficient financial responsibility is provided for the protection of the public, and this is nothing more than a contest between insurance companies.' "

The emphasis of the Act is the protection of innocent victims as opposed to the protection of a tort-feasor from liability for the loss he causes. For example "any motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this article." G.S. 20-279.21(h).

Canal's policy contained a clause stating that the insurance afforded would comply with the financial responsibility laws to the extent of the coverage and limit of liability required by that law. That clause also contained the reimbursement provi-

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sion set out in G.S. 20-279.21(h). Thus, if Canal is required to pay this claim, contrary to the express provision of the insurance contract and solely by reason of the Financial Responsibility Act, it presumably would look for reimbursement from its insured, Leo's, who, in turn could seek recovery from Dixie under the terms of the lease wherein Dixie contracted to pay all damages arising out of the use of the leased vehicle. The trail of responsibility would then appear to lead again to Utica under its insurance contract to insure Dixie against claims arising out of the use of the vehicle.

Absent the Financial Responsibility Act, Utica would clearly have no claim against Canal. We do not understand that these acts or the public policy behind them are intended to vest Utica with such a claim in this case.

The judgment is affirmed.

Affirmed.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. BOBBY LEE BYRD

No. 7410SC682

(Filed 20 November 1974)

1. Criminal Law § 92—armed robbery—breaking or entering—larceny—consolidation proper

A charge of armed robbery against defendant was sufficiently connected in time, place and circumstances with charges of breaking or entering and larceny to permit their consolidation under G.S. 15-152.

2. Searches and Seizures § 1—absence of vehicle registration—search of glove compartment by officer

N. J. law expressly authorizes police officers to stop motor vehicles at random and demand production of the operator's driver's license and motor vehicle registration; when, upon being stopped by a state policeman on the N. J. turnpike, defendant could not produce a registration certificate, an examination of the glove compartment for evidence of registration and ownership was reasonable.

3. Searches and Seizures § 1—lawful arrest—search of vehicle incident to arrest

Where an officer discovered a pistol in the glove compartment of defendant's vehicle during a reasonable search for evidence of owner-

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ship and the officer arrested defendant for possession of a pistol in a vehicle without a permit, the subsequent search inside the vehicle and the trunk was incident to the arrest of defendant and was reasonable.

APPEAL by defendant from *McLelland*, Judge, 11 February 1974 Session of Superior Court held in WAKE County.

Defendant was convicted of felonious breaking or entering of Leith Lincoln Mercury, Inc. in Raleigh and felonious larceny of a Lincoln Continental Mark IV from that firm. The crimes took place on the evening of 26 July 1973 or the early morning of 27 July 1973. The cases were consolidated with the trial of defendant for the armed robbery of J. P. Hayes, the operator of a jewelry store in Raleigh. Evidence for the State tended to show that defendant committed the robbery about 6:00 p.m. on 26 July 1973. On 28 July 1973, defendant was arrested in New Jersey. Defendant had possession of the stolen automobile and the jewelry previously stolen from Hayes.

A mistrial was declared in the armed robbery charge. A verdict of guilty was returned on the charges of felonious larceny and felonious breaking or entering. Judgments were entered imposing an active prison sentence in each case.

Attorney General James H. Carson, Jr., by T. Buie Costen and Rafford E. Jones, Assistant Attorneys General and Thomas M. Ringer, Jr., Associate Attorney, for the State.

Clayton, Myrick & McCain by Robert W. Myrick for defendant appellant.

VAUGHN, Judge.

[1] The charge of armed robbery was sufficiently connected in time, place and circumstances with the charges of breaking or entering and larceny to permit their consolidation under G.S. 15-152. Defendant's assignment of error directed to the denial of his motion to sever the cases for trial is overruled.

Defendant also contends that the Court erred in denying defendant's motion to suppress evidence obtained in a warrantless search of defendant's automobile. The search occurred when a state policeman observed defendant operating the stolen automobile on the New Jersey turnpike and stopped him for a driver's license and registration check. Defendant produced a driver's license but failed to produce a registration certificate

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for the vehicle. After questioning defendant concerning the automobile, the officer searched the glove compartment. The officer discovered a pistol in the glove compartment and immediately placed defendant under arrest. A subsequent inventory of the automobile produced the stolen jewelry.

[2] Police officers in New Jersey are expressly authorized to stop motor vehicles at random and demand production of the operator's driver's license and motor vehicle registration. N.J.S.A. 39:3-29. *State v. Gray*, 59 N.J. 563, 285 A. 2d 1. In *State v. Boykins*, the Supreme Court of New Jersey commented:

"Surely not every traffic violation will justify a search of every part of the vehicle. *See*, generally, annotation, 10 A.L.R. 3d 314 (1966). A traffic violation as such will justify a search for things related to it. So, for example, if the operator is unable to produce proof of registration, the officer may search the car for evidence of ownership [citations]. . . ." *State v. Boykins*, 50 N.J. 73, at 77, 232 A. 2d 141, at 143.

This is not contrary to the provisions of the fourth amendment of the United States Constitution and article I, paragraph 7 of the constitution of the State of New Jersey and such exercise "represents a valid exercise of the State's police power in furtherance of the State's legitimate interest [citations]." *State v. Gammons*, 113 N.J. Super. 434, at 437, 274 A. 2d 69, at 71; *aff'd*; 59 N.J. 451, 283 A. 2d 897. *See State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9. When defendant could not produce a registration certificate, the examination of the glove compartment for evidence of registration and ownership was reasonable, and the officer could not ignore the pistol that he found.

[3] Possession of a pistol in a vehicle without a permit is a violation of New Jersey law. N.J.S.A. 2A :151-41; *State v. Hock*, 54 N.J. 526, 257 A. 2d 699. After defendant was placed under arrest for that offense, the subsequent search inside the vehicle and the trunk was incident to the arrest of defendant and was reasonable.

Each of defendant's other assignments of error have been considered. We find no prejudicial error in defendant's trial.

No error.

Judges CAMPBELL and BRITT concur.

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STATE OF NORTH CAROLINA v. LARRY DARNELL MASSEY

No. 748SC788

(Filed 20 November 1974)

1. Criminal Law § 76—defendant's statement to deputy sheriff — voluntariness

The trial court properly concluded that statements made by defendant to a deputy sheriff were volunteered and were admissible where the evidence on voir dire tended to show that the deputy was taking another prisoner through a cellblock when the deputy spotted defendant, the deputy informed defendant that defendant had scared him and another officer by firing at them, defendant replied voluntarily, "If you think you were scared you should have seen us. We were all scared to death," and defendant stated to the deputy that he was using a .38 revolver and one of his comrades was using a .32 caliber automatic pistol.

2. Criminal Law § 76— defendant's statement to FBI agent — voluntariness

Evidence on voir dire supported the trial court's findings that defendant's statements to an FBI agent were voluntary where such evidence tended to show that the agent had advised defendant of his rights, defendant voluntarily executed a "waiver of rights" form, and defendant voluntarily told the agent that he was in the getaway car during a chase and shootout.

APPEAL by defendant from *Lanier, Judge*, 15 April 1974 Session of Superior Court held in WAYNE County.

Defendant was charged in separate indictments with two counts of assault with a firearm upon two law enforcement officers who were attempting to arrest defendant in connection with a bank robbery.

Evidence for the State tended to show the following. At the scene of the robbery, two officers received a description of the robbery suspects and their getaway car. While proceeding on the Goldsboro-Fremont highway in search of the suspects, officers observed an automobile fitting this description. As the officers approached, shots were fired at the officers from the suspects' vehicle. A chase ensued and other shots were fired. The officers began to fire at the suspects.

Other officers joined in the chase and came upon the getaway car at the end of a dirt road. Defendant was captured in the vicinity of the car. A search of defendant produced a title to the getaway car and some bullets in his coat pocket. A search

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of the general area produced a pistol, some fired shells, defendant's torn draft card, and defendant's torn driver's license.

Defendant offered no evidence. Upon a verdict of guilty of both charges, defendant was sentenced to consecutive terms of not less than four nor more than five years.

Attorney General James H. Carson, Jr., by Parks H. Icenhour, Assistant Attorney General, for the State.

Duke and Brown by J. Thomas Brown, Jr., for defendant appellant.

VAUGHN, Judge.

Although the record on appeal was not docketed in this Court within the time provided by Rule 5 of the Rules of Practice in this Court, we have elected to consider the case upon its merits.

[1] Defendant's court appointed counsel asserts that the court erred in its findings of fact and conclusions of law based upon a *voir dire* examination held to determine the admissibility of statements made by defendant to a deputy sheriff while defendant was in jail. The deputy was taking another prisoner through the cellblock and saw defendant. The deputy stated to defendant, "you really scared us to death the other day by shooting at us." Defendant replied voluntarily, "If you think you were scared you should have seen us. We were all scared to death." Defendant told the deputy that one of his comrades was using a .32 caliber automatic pistol and defendant was using a .38 revolver. The court concluded that these voluntary statements were admissible. Other statements made by defendant were excluded by the court.

As to the court's conclusion that the voluntary statements were admissible, volunteered statements are competent evidence. *State v. Haddock*, 281 N.C. 675, 190 S.E. 2d 208. Where, as here, findings of fact made by the trial judge upon *voir dire* as to the voluntariness of a statement are supported by competent evidence, the findings are conclusive on appeal. *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123; *State v. Caldwell*, 15 N.C. App. 342, 190 S.E. 2d 371.

[2] Defendant also asserts that the court erred in admitting into evidence statements made by defendant to an FBI agent while defendant was in jail. In his statement, defendant volun-

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tarily told the agent that he was in the getaway car during the chase and shootout. Defendant further commented on the chase and the two other men who were with him.

In *voir dire*, the court found the agent advised defendant of his constitutional rights, that defendant voluntarily executed a "waiver of rights" form, and that defendant voluntarily spoke with the agent about the incident. These findings were supported by competent evidence. Thus, the statements defendant made to the FBI were clearly voluntary and were, in every respect, competent evidence.

Defendant's other assignments of error have been considered and are overruled.

No error.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. LARRY JOE CONNER

No. 7429SC748

(Filed 20 November 1974)

Indictment and Warrant § 13—bill of particulars—evidence within transactions listed

Evidence presented by the State in an armed robbery prosecution, including photographs of the victim's residence used for illustrative purposes, corroborating statements made by the victim to the sheriff, and rebuttal evidence as to the bad character of defendant, was within the limits of the transactions set out in the bill of particulars and did not deprive defendant of a fair defense.

APPEAL by defendant from *Martin, Judge*, 13 May 1974 Session of Superior Court held in RUTHERFORD County.

Heard in Court of Appeals 15 October 1974.

Defendant was charged in separate bills of indictment with armed robbery of Lester Morgan on 10 October 1973, malicious maiming, and assault with a deadly weapon with intent to kill inflicting serious injuries. Prior to arraignment he moved pursuant to G.S. 15-143 for a Bill of Particulars, including a list of the State's witnesses, which the State furnished. Defendant pleaded not guilty and the charges were consolidated for trial.

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The victim, Lester Morgan, testified for the State. He identified defendant as one of three people—two men and a woman—whom he discovered ransacking his house when he returned from work sometime after 8:00 a.m. on 10 October 1973. He testified that defendant hit him on the head with a pistol, and tore his pocket off, taking a pocketbook containing more than \$19,000 that he had saved over 27 years. The other man kicked him in the head. As a result of these injuries, Lester Morgan lost an eye. Rutherford County Sheriff Blane Yelton testified concerning his investigation of the robbery and corroborated statements made to him by Morgan.

Larry Joe Conner testified in his own defense, denying that he was at the Morgan house on the morning in question. His wife testified that he was at home between 6:00 a.m. and 10:00 a.m. Another witness testified that he saw defendant's truck in his yard about 9:30 a.m. Defendant also put on character witnesses, whereupon the State tendered its own character witnesses, one of whom testified that he saw defendant's truck in a corn field below Mr. Morgan's house on the morning of 10 October 1973.

At the close of all the evidence, the trial court ruled that the maiming and assault charges merged into the armed robbery charge and submitted the case to the jury upon the single offense of armed robbery.

From a verdict of guilty and judgment imposing a sentence of 28 years imprisonment, defendant has appealed to this Court.

Attorney General James H. Carson, Jr., by Associate Attorney Archie W. Anders, for the State.

Robert L. Harris, for defendant appellant.

BALEY, Judge.

Defendant takes the position that the trial court erred in admitting evidence relating to matters which were not included in the Bill of Particulars furnished to him by the State. This assignment of error is based upon exceptions to the introduction of photographs of the victim's residence, to the testimony of Sheriff Blane Yelton in corroboration of statements made to him by defendant, and to testimony of character witnesses for the State.

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The purpose of a Bill of Particulars "is to give [defendant] notice of the specific charge or charges against him and to apprise him of the particular transactions which are to be brought in question on the trial, so that he may the better or more intelligently prepare his defense, and its effect, when furnished, is to limit the evidence to the transactions set out therein." *State v. Wadford*, 194 N.C. 336, 339, 139 S.E. 608, 610.

Defendant was fully informed of the charges against him in this case and the specific transactions which gave rise to such charges. He was furnished all the information which was necessary to enable him to prepare any proper defense. The Bill of Particulars listed material witnesses which included Sheriff Yelton and the victim, Lester Morgan. To illustrate his testimony Sheriff Yelton was permitted to use photographs of the victim's residence. He also testified in corroboration of statements made to him by Mr. Morgan. After defendant put his character in issue, the State in rebuttal was allowed to offer evidence of the bad character of defendant. 1 Stansbury, N. C. Evidence (Brandis rev.), § 105. All of this evidence is competent and was directly related to the transactions referred to in the Bill of Particulars and indictment. There was no attempt to surprise the defendant or bring in any irrelevant information.

We find that the evidence presented by the State was within the limits of the transactions set out in the Bill of Particulars and did not deprive defendant of a fair defense.

No error.

Judges MORRIS and HEDRICK concur.

ELEANOR HICKS v. DURHAM LIFE INSURANCE COMPANY

No. 7426DC726

(Filed 20 November 1974)

Insurance § 14—life insurance—death resulting from homicide or intentional act—exclusion of coverage

Provision of a life insurance policy excluding coverage when death occurred from "homicide or intentional act of another person" did not apply to this case where insured died as the result of an accidental

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gunshot wound inflicted by one who later pleaded guilty to a charge of involuntary manslaughter.

APPEAL by defendant from *Johnson, Judge*, 18 February 1974 Session of District Court held in MECKLENBURG County.

Heard in Court of Appeals 19 September 1974.

This is an action brought by plaintiff, the named beneficiary, to recover proceeds under an insurance policy issued by defendant on the life of plaintiff's husband. The policy contained the following exclusionary provision: "The insurance under this policy shall not be payable if the insured's death . . . results from any one of the following . . . (e) homicide or the intentional act of another person." Plaintiff's husband died as the result of an accidental gunshot wound inflicted by Robert Earl Phillips, who later pleaded guilty to a charge of involuntary manslaughter.

After answer was filed, defendant moved for summary judgment. In support of the motion it offered the deposition of Robert Earl Phillips stating that on the evening of 30 June 1972 he was walking up to Puckett's Farm Equipment in Mecklenburg County, and someone mentioned his having a gun. He pulled the gun from his jacket, and it unexpectedly went off in his hand. The bullet struck Norman G. Hicks, the insured, and killed him.

Plaintiff likewise moved for summary judgment on the basis of Phillips' deposition.

After a hearing on both motions the trial court granted summary judgment for the plaintiff, and defendant appealed.

James B. Ledford and Richard A. Cohan, by Richard A. Cohan, for plaintiff appellee.

Hedrick, McKnight, Parham, Helms, Warley and Kellam, by Richard T. Feerick, for defendant appellant.

BALEY, Judge.

The only issue before this Court is whether the policy provision excluding death from "homicide or intentional act of another person" applies to the uncontroverted facts of this case. Defendant contends that because Phillips pleaded guilty to involuntary manslaughter, a degree of homicide under G.S. 14-18,

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the exclusion is applicable and plaintiff is not entitled to recover for the death of her husband. We do not agree with this narrow interpretation of the exclusionary provision of this policy. One may die as the result of an accident caused by the negligent act of another for which there may be criminal liability, and yet not be the victim of a "homicide" within the general meaning of that term as used in an insurance policy.

Other courts have generally construed "homicide" to mean an intentional killing. *Great So. Life Ins. Co. v. Campbell*, 148 Miss. 173, 114 So. 262 (1937) ; *Day v. Interstate Life & Acc. Co.*, 163 Tenn. 190, 42 S.W. 2d 208 (1931) ; *Seaboard Life Ins. Co. v. Murphy*, 134 Tex. 165, 132 S.W. 2d 393 (1939). See also Annot., 56 A.L.R. 685 (1928). In *Goldberg v. Insurance Co.*, 248 N.C. 86, 88, 102 S.E. 2d 521, 523, our North Carolina Supreme Court said:

"[D]eath having resulted from the voluntary, unlawful act of Dr. Black, i.e., an assault and battery, it was death by 'homicide' within the meaning of the exception clauses of the policies. (citations omitted.)"

To a layman, the word "homicide" imports a voluntary or intentional act. The language of the policy—"homicide or intentional act"—is ambiguous and implies that the homicide must involve a conscious intent. Any uncertainty as to the meaning of the words used in the exclusionary provision of the policy must be construed in favor of the policyholder and against the company. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518. If the insurer desires to avoid coverage under its policy in cases where a negligent act may involve criminal responsibility, it should be expressly stated.

The undisputed evidence is that there was no intentional act on Phillips' part and the insured died as the result of a tragic accident. On cross-examination by defendant's attorney, Phillips said in his deposition:

"I did not know that the gun was going to discharge when I held it in my hand, and I did not intend for it to discharge. I did not intend for it to shoot Mr. Hicks or to do him any harm, and I don't know what caused the gun to discharge. I did not do anything deliberately, did not intend for the gun to fire. I do not know whether or not I did anything to cause it to fire. It was an accident. I'm say-

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ing I did not intend for the gun to fire, and I don't know of anything that I did to cause it to fire."

There being no issue of fact, summary judgment was properly entered for the plaintiff.

Affirmed.

Judges BRITT and HEDRICK concur.

J. A. PRITCHETT, EXECUTOR OF THE WILL OF LEWIS W. THOMPSON, JR., PLAINTIFF v. WILLIAM C. THOMPSON, BURGESS U. WHITEHEAD, LEWIS WHITEHEAD, JOSEPH GREENE WHITEHEAD, THOMAS WHITMEL GRIFFIN, MARGARET URQUHART GRIFFIN, CHARLES B. GRIFFIN, JR., MARY BOND GRIFFIN JACKSON, BURGESS U. GRIFFIN, BURGESS URQUHART, JR., THOMAS M. URQUHART, EMILY M. URQUHART AYSCUE, RICHARD A. URQUHART, JR., KATE FENNER URQUHART, WILLIAM E. URQUHART, MARY LOCKHART J. McMURRAN, JAMES P. JOHNSON, ANNE JANET JOHNSON SHEPHERD, THOMAS GRIFFIN JOHNSON, JOHN S. JOHNSON, JOHN GRIFFIN MARSHALL, CHARLES M. MARSHALL, JAMES DAVID MARSHALL, ROBERT LEE MARSHALL, JOHN SCOTT BRITTON, TEMPERANCE G. BRITTON, THELMA LEWIS BRITTON, MARY DOE (A DAUGHTER OF HUNTER GRIFFIN, CORRECT NAME UNKNOWN), ELIZABETH HARRELL BAZEMORE, JEAN WHITEHEAD CURRY, P. E. WALTERS, ELEANOR VIRGINIA OLIVER GOODWIN, SALLIE CORA EASON NORFLEET, THOMAS B. SLADE III, RICHARD G. SLADE, MARY WARD SLADE PURVIS, DEFENDANTS

No. 746SC736

(Filed 20 November 1974)

Wills § 73—no determination of beneficiaries during life of life tenant—subsequent death of life tenant

Trial court's dismissal of plaintiff's action to determine distribution of testator's estate on the ground that such adjudication during the life of the life tenant would be premature is reversed where the life tenant died pending the appeal from the dismissal.

APPEAL by defendant, Sallie Cora Eason Norfleet, from *Martin (Perry)*, Judge, 20 May 1974 Session of Superior Court held in BERTIE County.

Heard in Court of Appeals 26 September 1974.

Plaintiff, as executor of the Will of Lewis W. Thompson, Jr., brings this action under the Declaratory Judgment Act,

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G.S. 1-255 et seq., to obtain instructions concerning the distribution of the estate of Lewis W. Thompson, Jr., with particular reference to a determination of the beneficiaries who would be entitled to share on his father's side. The entire Will reads as follows:

"I L. W. Thompson, Jr. do make this my last will:

"I want my debts and all expenses paid. Then I give to my uncle W. C. Thompson for his life all my real estate and the income from my personal property for life. At his death $\frac{1}{2}$ of my estate shall be given to my nearest next of kin on my father's side, and the other $\frac{1}{2}$ to the nearest of kin on my mother's side, and this shall include the children of my Two deceased uncles. I do hereby appoint J. A. Pritchett as my executor and revoke all wills I have made before.

"This the 23rd April, 1973.

s/ L. W. Thompson, Jr. (SEAL)"

Several of the defendants who claim to be beneficiaries filed answers setting out their respective claims to the estate, and other defendants made motions to dismiss the action pursuant to Rule 12(b) (6), Rules of Civil Procedure, contending that there could be no adjudication of the rights of the parties during the life of the life tenant, W. C. Thompson.

After examining the Will and the pleadings and hearing argument, the court found:

"[T]he court being of the opinion therefore that an adjudication herein during the life of said life tenant, W. C. Thompson, would be premature and ineffective and consequently no determination or declaration can be made as to the persons entitled to said remainder interests until after the death of said life tenant."

and granted the motions to dismiss.

From the judgment of dismissal, defendant Sallie Cora Eason Norfleet has appealed.

Gillam & Gillam, by M. B. Gillam, Jr., for defendant appellant Sallie Cora Eason Norfleet.

White, Hall, Mullen & Brumsey, by Gerald F. White, and Griffin & Martin, by Hugh M. Martin, for defendant appellees Burgess U. Whitehead and other defendants listed in statement.

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BALEY, Judge.

While this appeal was pending, the life tenant, W. C. Thompson, uncle of Lewis W. Thompson, Jr., died on the 4th day of October, 1974, and stipulation to this effect signed by counsel for all parties has been filed in this Court as a part of the record. Since the outstanding life estate has now terminated, the reason assigned by the trial court for dismissal of the action no longer obtains. Without passing on the merits of this appeal, the judgment of dismissal is reversed, and the cause is remanded to the Superior Court for a determination of the rights of the parties.

Reversed and remanded.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. GEORGE WALTER BRISSENDEN
AND LARRY DALE DAUGHERTY

No. 7420SC725

(Filed 20 November 1974)

1. Searches and Seizures § 3—validity of warrant—probable cause

Search warrant was valid where it described the persons and premises to be searched and the marijuana expected to be seized and it was supported by an officer's affidavit setting out information based on his personal knowledge and information furnished by a reliable informant to the effect that marijuana had been seen on the day in question on the described premises.

2. Searches and Seizures § 4—search under warrant—legality of entry

Entry made by officers in the execution of a search warrant was valid where an officer knocked twice on a door that was ajar and was greeted by one of the defendants who was inside the premises.

APPEAL by defendants from *Seay, Judge*, 29 April 1974 Session of Superior Court held in MOORE County.

Heard in Court of Appeals 24 September 1974.

Defendants were charged in a bill of indictment with possession of 5 grams of marijuana with intent to distribute, in violation of G.S. 90-95(a) (1). They entered pleas of not guilty and were convicted by the jury of possession of marijuana. From

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judgments imposing prison sentences of six months, defendants have appealed.

Attorney General James H. Carson, Jr., by Assistant Attorney General William F. O'Connell, for the State.

P. Wayne Robbins and Bruce T. Cunningham, Jr., for defendant appellants.

BALEY, Judge.

The sole assignment of error is to the failure of the trial court to grant the motion of defendants to suppress the evidence obtained on a search of their premises. Defendants contend, first, that the search warrant was invalid, and, second, that the entry made by the officers in the execution of the warrant was unlawful. We find no merit in either contention.

[1] The warrant was issued in full compliance with the requirements of G.S. 15-26. It described the persons and premises to be searched and the marijuana expected to be seized. It was supported by an affidavit from an officer setting out information based on his personal knowledge and information furnished by a reliable informant to the effect that the marijuana had been seen on the day in question on the premises described. There were ample grounds from which the magistrate could make an independent finding of probable cause.

[2] With respect to the alleged illegal entry, the trial judge found on a *voir dire* hearing that "there was no forcible entry of the premises, but indeed a knocking and entry by the officers after his presence was made known . . . to the defendant Larry Daugherty, who was then inside the premises." There was competent testimony at the hearing to support these findings of fact. They are binding on appeal. *State v. Pike*, 273 N.C. 102, 159 S.E. 2d 334.

The findings of fact by the trial judge on *voir dire* hearing show a sufficient compliance with the rationale of *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897, and *State v. Covington*, 273 N.C. 690, 161 S.E. 2d 140, upon which defendants rely. In neither of those two cases was the presence of the officers known until after they entered the premises. In this case, Chief Seawell knocked twice on a door that was ajar. Having been greeted by defendant Daugherty, he was justified in entering the living room. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706.

Moore v. Strickland

Upon search of defendants' apartment the officers found eleven bags containing a total of 268.5 grams of marijuana.

The motion to suppress was properly denied. Defendants have received a fair trial free from prejudicial error.

No error.

Judges MORRIS and HEDRICK concur.

J. McKINNON MOORE v. J. E. STRICKLAND

No. 744DC787

(Filed 20 November 1974)

Appeal and Error § 24—exceptions appearing only in assignments of error

Exceptions appearing nowhere in the record except in purported assignments of error are completely ineffectual and will not be considered on appeal; however, when exceptions have not been properly preserved, the appeal will be taken as an exception to the judgment.

APPEAL by defendant from *Crumpler, Judge*, 25 April 1974 Session of District Court held in SAMPSON County. Heard in the Court of Appeals 23 October 1974.

This is a civil action to recover damages for breach of an alleged brokerage contract for the sale of certain real property. Plaintiff alleged and offered proof that on 20 February 1973, the defendant signed an exclusive listing agreement for the sale of certain real property under the terms of which plaintiff was to have an exclusive right to sell the property referred to in the agreement within the time stated therein. Defendant was to receive a stated sum of money from the sale, to wit: \$9,000, with the plaintiff's commissions, if any, coming from any "overage" that plaintiff might obtain from the sale.

Defendant admitted signing the exclusive listing agreement but alleged and offered proof tending to show that at the time he signed the agreement he lacked sufficient mental capacity to know the force and effect of his signing the agreement, and further, that in any event, he had revoked the agreement before the plaintiff obtained a willing and able purchaser to whom the property could be sold pursuant to the agreement.

Moore v. Strickland

Plaintiff alleged and offered proof that he had acquired a willing and able purchaser as provided in the agreement and that he had done this prior to receiving a letter from the defendant purporting to revoke the agreement. Defendant admitted that he sold the property for \$12,000 some six weeks after signing the agreement. The purchaser was the same purchaser identified by plaintiff as the willing and able purchaser found by him.

The jury answered the issues submitted to them in favor of plaintiff and awarded plaintiff \$2,950 damages. Defendant appeals from judgment entered on the verdict.

Warren and Fowler, by Miles B. Fowler, for plaintiff appellee.

E. C. Thompson III for defendant appellant.

MORRIS, Judge.

The appellant in his record on appeal undertakes to set out 20 assignments of error based on a like number of exceptions, without making any attempt to group his assignments of error. The exceptions appear nowhere in the record except in the purported assignments of error. Such exceptions are completely ineffectual and will not be considered on appeal. Rule 21, Rules of Practice in the Court of Appeals. *State v. Hewett*, 270 N.C. 348, 154 S.E. 2d 476 (1967); *Dilday v. Board of Education*, 267 N.C. 438, 148 S.E. 2d 513 (1966); *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964); *In re Register*, 5 N.C. App. 29, 167 S.E. 2d 802 (1969); *Midgett v. Midgett*, 5 N.C. App. 74, 168 S.E. 2d 53 (1969). However, in the absence of exceptions, or when exceptions have not been properly preserved in accordance with our Rules of Practice, the appeal will be taken as an exception to the judgment. *Holden v. Holden*, 245 N.C. 1, 95 S.E. 2d 118 (1956). We are, therefore, limited to the question whether error appears on the face of the record.

We find no error appearing on the face of the record. Indeed, our review of the entire record reveals no error sufficiently prejudicial to warrant a new trial.

No error.

Judges HEDRICK and BAILEY concur.

State v. Hudson

STATE OF NORTH CAROLINA v. EDDIE HUDSON

No. 7426SC786

(Filed 20 November 1974)

1. Criminal Law § 98—sequestration of witnesses denied

The trial court did not abuse its discretion in denying defendant's motion to sequester witnesses where the motion named no witnesses and gave no reasons therefor.

2. Criminal Law § 43—photographs of deceased — admission proper

In a prosecution for murder and assault with intent to kill, the trial court did not err in allowing into evidence photographs of the deceased.

APPEAL by defendant from *Chess, Special Judge*, 25 March 1974 Schedule "D" Criminal Session of Superior Court held in MECKLENBURG County. Heard in the Court of Appeals 21 October 1974.

This is a criminal action in which the defendant was charged in separate bills of indictment with the offenses of murder and assault with a deadly weapon with the intent to kill. Defendant entered a plea of not guilty to each charge, but was found guilty by the jury of voluntary manslaughter and assault with a deadly weapon. From a judgment sentencing him to a term of not less than 15 nor more than 20 years for voluntary manslaughter and to a term of two years for assault with a deadly weapon, defendant appealed.

Attorney General Carson, by Associate Attorney Kaylor, for the State.

Plumides, Plumides and Shuster, by John G. Plumides, for defendant appellant.

MORRIS, Judge.

[1] Prior to the presentation of any evidence, defendant moved that the witnesses for the State be sequestered. His motion named no witnesses and gave no reasons therefor. On appeal, he contends the court's denial of his motion constituted prejudicial error. He concedes that the sequestration of witnesses is not a matter of right but is discretionary with the trial judge. What

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was said on this question by Justice Huskins in *State v. Taylor*, 280 N.C. 273, 277, 185 S.E. 2d 677 (1972), is appropriate here:

“Sequestration of witnesses is discretionary with the trial judge and may not be claimed as a matter of right. Stansbury, N. C. Evidence § 20 (2d Ed., 1963). Refusal to sequester the State’s witness in a criminal case is not reviewable unless an abuse of discretion is shown. *State v. Clayton*, 272 N.C. 377, 158 S.E. 2d 557 (1968). This accords with the great majority of jurisdictions. 53 Am. Jur., Trial § 31 (1945). The record before us discloses no reason for sequestration of the State’s two minor witnesses—the victim and her small brother—and no abuse of discretion has been shown. That ends the matter.” (Citations omitted.)

[2] Defendant’s only other assignment of error before us is that the court erred in allowing into evidence photographs of the deceased, defendant’s wife. Again, he concedes that the general law is that if the photograph is relevant and material, the fact that it may be gory and even gruesome will not, standing alone, render it inadmissible. *State v. Duncan*, 282 N.C. 412, 193 S.E. 2d 65 (1972). Defendant argues, however, that in this case the allowance of the photograph in evidence in addition to the court’s failure to sequester the State’s witnesses created an atmosphere of prejudice which defendant was not able to overcome. He gives no reason for this argument, nor can we assign any cogent reasons therefor. This assignment of error is without merit and overruled.

Defendant had a fair trial free from prejudicial error at which he was represented by competent counsel of his own choosing.

No error.

Judges HEDRICK and BAILEY concur.

McCullen v. Wel-Mil Corp.

CHARLES McCULLEN AND MIKE WILKINSON, TRADING AS C. & M. PAINT COMPANY v. WEL-MIL CORPORATION, d/b/a WELLS CONSTRUCTION COMPANY

No. 748DC774

(Filed 20 November 1974)

1. Contracts § 29; Damages § 15—lost profits—sufficiency of evidence,

In an action for breach of contract for plaintiffs to paint two houses, plaintiffs' evidence was sufficient for the jury to determine the amount of their lost profits where they presented evidence of the contract price, the cost of materials, the amount already received from defendant on the contract, and that no one else was working for them.

2. Contracts § 29; Damages § 9—breach of contract—mitigation of damages—gains on other projects

In an action for breach of contract for plaintiffs to paint two houses, damages suffered by plaintiffs were not mitigated by the constant employment of plaintiffs by defendant where there was no showing that plaintiffs' gains from subsequent work could not have been made had there been no initial breach of contract.

APPEAL by defendant from *Nowell, Judge*, 22 May 1974 Session of WAYNE County District Court. Heard in the Court of Appeals on 22 October 1974.

This is an action to recover damages for breach of contract. According to plaintiff Wilkinson, two contracts existed between plaintiffs and defendant whereby plaintiffs had agreed to paint two houses on lots 7 and 13 in a subdivision known as "Foxfire." The evidence tends to show the houses in question had been primed by plaintiffs, and, while plaintiffs expected to complete the jobs, defendant had brought in another painting contractor who completed the work. Judgment was entered pursuant to a jury verdict awarding plaintiffs \$1,400.00. Defendant appealed.

Strickland & Rouse, by Thomas E. Strickland and David M. Rouse, for plaintiff appellees.

Barnes & Braswell, by Henson P. Barnes and Michael A. Ellis, for defendant appellant.

MARTIN, Judge.

[1] The gist of defendant's first assignment of error is that there was an insufficient basis provided by plaintiffs' evidence by which the jury could determine plaintiffs' damages. Defendant bases his argument on *Tillis v. Cotton Mills* and *Cotton Mills*

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v. Tillis, 251 N.C. 359, 111 S.E. 2d 606 (1959) where the Court states that a party seeking damages for breach of an executory contract must present facts, as to all reasonable factors involved, so that the jury may have a basis for determining damages. The Court in *Tillis*, page 366, also states, "Absolute certainty is not required, but evidence of damages must be sufficiently specific and complete to permit the jury to arrive at a reasonable conclusion." In the instant case, plaintiff Wilkinson calculated plaintiffs' lost profits on each contract by using the following factors: the contract price, the cost of materials, and the amounts already received from defendant on the contracts. The evidence tends to show that plaintiffs had no one else working for them. We hold that plaintiffs presented an adequate basis for their recovery of lost profits. While it appears that plaintiff Wilkinson made a slight arithmetic error, it was in defendant's favor. This assignment of error is overruled.

[2] Finally, defendant contends the trial court erred in overruling defendant's motion for directed verdict since any damages suffered by plaintiffs were mitigated by the constant employment of plaintiffs by defendant.

"Gains made by the injured party on other transactions after the breach are never to be deducted from the damages that are otherwise recoverable, unless such gains could not have been made, had their been no breach." 5 Corbin on Contracts, § 1041, p. 256 (1951).

There is no indication that plaintiffs' gains from subsequent work could not have been made, had there been no initial breach of contract. This assignment of error is overruled.

No error.

Chief Judge BROCK and Judge PARKER concur.

EDWARD HOMER WATTS v. FORREST E. TODD

No. 7426DC636

(Filed 20 November 1974)

Evidence § 45—opinion testimony as to value—exclusion erroneous

In an action to recover on a note a sum due from sale of a business where defendant claimed that plaintiff had taken possession of col-

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lateral without applying the proceeds therefrom toward the debt, the trial court erred in not admitting defendant's testimony placing a value on the collateral.

APPEAL by defendant from *Johnson, Judge*, 18 February 1974 Session of MECKLENBURG County District Court. Heard in the Court of Appeals on 15 October 1974.

Plaintiff sued to recover on a note wherein the defendant, as maker of the note, was obligated to pay plaintiff \$3000.00. This sum represented the balance due plaintiff from the sale of a business to defendant. Contemporaneous with the note, an agreement was executed granting plaintiff a security interest in various items of equipment located at the business premises. Defendant answered the complaint alleging in part that plaintiff had taken possession of the collateral without applying the proceeds therefrom toward the debt as provided in the security agreement.

Peter L. Reynolds, for plaintiff appellee.

Robertson & Brumley, by Richard H. Robertson, for defendant appellant.

MARTIN, Judge.

The undisputed evidence shows that plaintiff had taken possession of the collateral after defendant's default on the note. Defendant contends the trial court erred in not admitting into evidence defendant's testimony placing a value on the collateral. The testimony by defendant shows he was familiar with the collateral and has such knowledge and experience as to enable him to intelligently place a value on the collateral. "It is not necessary that a witness be an expert in order to give his opinion as to value." *State v. Cotten*, 2 N.C. App. 305, 163 S.E. 2d 100 (1968). "[I]t is enough that he is familiar with the thing upon which he professes to put a value and has such knowledge and experience as to enable him intelligently to place a value on it." 1 Stansbury, N. C. Evidence, Brandis' Revision, § 128, p. 408. This assignment of error is sustained and a new trial is ordered.

Discussion of defendant's other assignments of error is unnecessary since the asserted errors to which they relate may not recur at the next trial.

Redmond v. City of Asheville

New trial.

Chief Judge BROCK and Judge PARKER concur.

JAMES S. REDMOND AND WIFE, MAYME HOLLIS REDMOND v. THE
CITY OF ASHEVILLE, NORTH CAROLINA

No. 7428SC693

(Filed 20 November 1974)

Municipal Corporations § 43— sewer overflow — action against city — failure to present claim to city council

Letter from plaintiffs' attorney to the city manager requesting that the city pay damages caused by a sewer overflow did not comply with a city charter requirement that any claim against the city be presented to the city council prior to the commencement of a suit on the claim, and summary judgment was properly entered for the city in plaintiffs' action to recover for the damages.

APPEAL by plaintiffs from *McLean, Judge*, 8 April 1974 Session of Superior Court held in BUNCOMBE County.

This is an action for damages allegedly resulting from defendant's negligence in the maintenance of one of its sewer lines.

Defendant's municipal charter requires that any claim against it be presented to the City Council prior to commencement of a suit on the claim.

Prior to the institution of this action plaintiffs complained to the director of the county health department who notified the City Manager of Asheville of the problems plaintiffs were having with respect to the sewer lines. Later, and also prior to suit, plaintiffs' attorney sent a letter to the City Manager of Asheville requesting that the city pay damages caused by the sewer overflow. The amount of damages claimed was not indicated in the letter. The City Manager replied to plaintiffs' attorney and advised that the complaint would be investigated. Plaintiffs gave no other notice of the alleged claim.

The Court granted defendant's motion for summary judgment on the grounds that the suit was barred because of plaintiffs' failure to give notice to the City Council as required by the charter.

Redmond v. City of Asheville

Bruce A. Elmore by George W. Moore for plaintiff appellant.

Patla, Straus, Robinson & Moore, P.A. by Victor W. Buchanan for defendant appellee.

VAUGHN, Judge.

Plaintiffs contend that their letter to the City Manager should be adjudged substantial compliance with the charter requirement that the claim be presented to the City Council. The Supreme Court of North Carolina has decided otherwise. "The statute and the decided cases do not permit the court to repeal the plain wording of the requirement that notice in writing be given to the named officials . . . Relaxation of the rules is within the jurisdiction of the agency that makes them—that is the General Assembly." *Johnson v. City of Winston-Salem*, 282 N.C. 518, 523, 193 S.E. 2d 717, 721. In *Johnson*, the claim was barred because it was not filed with the board of aldermen or mayor even though the claimant had carried on extensive negotiations with a full time "Claims Investigator" for the city and with the city attorney and had every reason to believe that his claim was in the process of settlement. The Court held that "[A]nything short of a written claim signed by the plaintiff or his attorney and filed with the board of aldermen or the mayor within the ninety days, required a dismissal of the action." 282 N.C., at 523, 193 S.E. 2d, at 721. See also *Nevins v. Lexington*, 212 N.C. 616, 194 S.E. 293, where in an action arising out of a contract, the Court held that notice to the City Manager was not sufficient under a statute which required only notification of "the proper municipal authorities."

In the case before us plaintiffs failed to give the required notice prior to the commencement of the action. Defendant was entitled to judgment as a matter of law. It was proper, therefore, for the Court to grant summary judgment in defendant's favor.

Affirmed.

Judges CAMPBELL and BRITT concur.

State v. Joyner

STATE OF NORTH CAROLINA v. EDWARD EARL JOYNER

No. 748SC663

(Filed 20 November 1974)

1. Criminal Law § 124— verdict of “guilty as charged” — sufficiency

Where the clerk asked the jury if they found defendant guilty as charged or not guilty, the verdict “guilty as charged” alluded to the warrant and it was not necessary that the clerk’s question contain all the elements of a criminal offense.

2. Criminal Law § 113— jury instructions — summary of evidence not required

A trial judge is not required to summarize the evidence to the jury; rather, he must state only such evidence which is necessary to explain the application of the law thereto.

APPEAL by defendant from *Winner, Judge*, 13 May 1974 Session of Superior Court held in LENOIR County.

Defendant was convicted under a warrant charging him with operating a motor vehicle on a public highway at a time when his license was suspended. Judgment was entered imposing an active sentence of six months.

Attorney General James H. Carson, Jr., by John R. Morgan, Associate Attorney, for the State.

Gerrans & Spence by C. E. Gerrans for defendant appellant.

VAUGHN, Judge.

[1] Defendant contends that the court erred in accepting the verdict of the jury. The proceedings were as follows:

“CLERK . . . How find you the defendant, Edward Earl Joyner as to the charge of driving while license suspended, guilty as charged or not guilty?”

JUROR: We find the defendant guilty as charged.”

Defendant argues that the jury has not convicted him of a crime because the Clerk’s question did not contain all the elements of a criminal offense. We overrule the assignment of error. The verdict “guilty as charged” alludes to the warrant, *State v. Medlin*, 15 N.C. App. 434, 190 S.E. 2d 425, and will thus be interpreted in the light of the warrant. *State v. Albarty*, 238 N.C. 130, 76 S.E. 2d 381.

Sample v. Motor Co.

[2] The only other assignment of error is that the court "erred in failing to summarize the evidence to the jury." A judge is not required to "summarize the evidence." He is required to declare and explain the law arising on the evidence given in the case and need not state such evidence except to the extent necessary to explain the application of the law thereto. G.S. 1-180. This assignment of error is overruled.

We find no prejudicial error in defendant's trial.

No error.

Judges CAMPBELL and MORRIS concur.

M. B. SAMPLE AND GERTRUDE Y. SAMPLE v. TOWE MOTOR COMPANY, INC.

No. 741DC596

(Filed 20 November 1974)

Venue § 5— action involving real property — county where land located as proper venue

Action to terminate a lease should have been brought in the county where the leased premises were located since the lease in question vested defendant with an estate or interest in real property, and the trial court erred in denying defendant's motion for a change of venue to such county. G.S. 1-76.

APPEAL by defendants from *Horner, Judge*, 3 June 1974 Session of District Court held in DARE County.

Defendant appeals from the denial of his motion for a change of venue to PASQUOTANK County.

Twiford, Abbott & Seawell by Christopher L. Seawell for plaintiff appellee.

Walter G. Edwards; White, Hall, Mullen & Brumsey by Gerald F. White, attorneys for defendant appellant.

VAUGHN, Judge.

Actions for the recovery of real property, or of an estate or interest therein, or for the determination in any form of such

State v. Kennedy

rights or interest must be brought in the county in which some part of the subject of the action is located. G.S. 1-76.

Plaintiffs alleged that they leased real estate, located in Pasquotank County, to defendant for a term of five years and that the lease was extended for an additional five-year term on 10 August 1972. Plaintiffs alleged defendant had breached the lease by (1) failing to make improvements to the premises and (2) by subleasing the premises. Plaintiffs alleged that they had notified defendant that it had breached the lease and requested defendant to vacate the premises. Plaintiffs asked the Court to order the lease terminated and enter a money judgment for damages.

The lease in question vested defendant with "an estate or interest" in real property. The action seeks to terminate that interest and will require the Court to determine the respective rights of the parties with respect to the leasehold interest. The order denying defendant's motion for a change of venue is reversed.

Reversed.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. LYNN LEROY KENNEDY

No. 745SC792

(Filed 20 November 1974)

Crime Against Nature § 1— constitutionality of statute

The crime against nature statute, G.S. 14-177, is not unconstitutionally vague.

Defendant appeals from *Wells, Judge*, 13 May 1974 Session of Superior Court held in PENDER County. Heard in the Court of Appeals on 21 October 1974.

Defendant was indicted and tried for violating G.S. 14-177, which prohibits crimes against nature. From a verdict of guilty and a sentence of six to ten years in prison, defendant appealed.

State v. Green

Attorney General Carson, by Assistant Attorney General Robert G. Webb, for the State.

Corbett & Fisler, by Leon H. Corbett, Sr., for defendant appellant.

MARTIN, Judge.

Counsel for defendant admits he is unable to find prejudicial error committed at trial but urges this Court to hold G.S. 14-177 unconstitutionally vague. We have reviewed the record and also find no prejudicial error. Furthermore, we reaffirm *State v. Moles*, 17 N.C. App. 664, 195 S.E. 2d 352 (1973) where this Court upheld the validity of G.S. 14-177. In *Perkins v. State of North Carolina*, 234 F. Supp. 333 (1964), Chief Judge Craven also upheld the validity of this statute against an attack for vagueness by reading the statute in light of North Carolina Supreme Court interpretations thereof.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. ROBERT GREEN

No. 7410SC744

(Filed 20 November 1974)

APPEAL by defendant from *Godwin, Judge*, 13 May 1974 Session of Superior Court held in WAKE County.

Heard in Court of Appeals 24 September 1974.

Defendant was convicted by a jury of breaking and entering Vance Elementary School near Raleigh on 24 November 1973 and stealing food products valued at \$90.00. The charges were consolidated for judgment, and defendant received a prison sentence of 4 to 6 years.

From this judgment defendant has appealed.

State v. Green

Attorney General James H. Carson, Jr., by Associate Attorney Archie W. Anders, for the State.

Charles A. Parlato for defendant appellant.

BALEY, Judge.

Both defense counsel and the Attorney General have been unable to find any prejudicial error in the trial. The evidence presented by the State was overwhelming. It included witnesses who saw the break-in and who discovered the stolen property in defendant's possession within a few minutes after it was removed from the school. The exception to the judgment presents the face of the record proper for review. We have carefully examined the record and find no error.

No error.

Judges MORRIS and HEDRICK concur.

ANALYTICAL INDEX



WORD AND PHRASE INDEX

TOPICS COVERED IN THIS INDEX

Titles and section numbers in this index, e.g. Appeal and Error
§ 1, correspond with titles and section numbers in N. C. Index 2d.

<p> ACCORD AND SATISFACTION ADVERSE POSSESSION APPEAL AND ERROR ARREST AND BAIL ASSAULT AND BATTERY ASSIGNMENTS ATTACHMENT ATTORNEY AND CLIENT AUTOMOBILES AVIATION BOUNDARIES BURGLARY AND UNLAWFUL BREAKINGS CANCELLATION AND RESCISSION OF INSTRUMENTS COLLEGES AND UNIVERSITIES CONSTITUTIONAL LAW CONTRACTS CORPORATIONS COSTS COUNTIES COURTS CRIME AGAINST NATURE CRIMINAL LAW CUSTOMS AND USAGES DAMAGES DEATH DEEDS DIVORCE AND ALIMONY ELECTIONS EMINENT DOMAIN ESTATES EVIDENCE EXECUTION EXECUTORS AND ADMINISTRATORS FORGERY FRAUDS, STATUTE OF GAMBLING HOMICIDE HUSBAND AND WIFE INDICTMENT AND WARRANT INFANTS INJUNCTIONS </p>	<p> INSURANCE INTOXICATING LIQUOR JUDGMENTS JURY LABORERS' AND MATERIALMEN'S LIENS LANDLORD AND TENANT LARCENY LIMITATION OF ACTIONS MANDAMUS MASTER AND SERVANT MORTGAGES AND DEEDS OF TRUST MUNICIPAL CORPORATIONS NARCOTICS NEGLIGENCE PARENT AND CHILD PARTITION PHYSICIANS AND SURGEONS RECEIVERS RECEIVING STOLEN GOODS REFORMATION OF INSTRUMENTS REGISTERS OF DEEDS REGISTRATION ROBBERY RULES OF CIVIL PROCEDURE SALES SEARCHES AND SEIZURES SPECIFIC PERFORMANCE STATE TAXATION TORTS TRESPASS TRESPASS TO TRY TITLE TRIAL TRUSTS UNIFORM COMMERCIAL CODE VENDOR AND PURCHASER VENUE WAIVER WATERS AND WATERCOURSES WILLS WITNESSES </p>
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ACCORD AND SATISFACTION

§ 1. Open and Running Accounts

Defendant's acceptance of \$28,000 plus a note for \$7570 as the final purchase price of a house was not an accord and satisfaction. *Andrews v. Builders and Finance*, 608.

ADVERSE POSSESSION

§ 24. Competency and Relevancy of Evidence

Trial court properly allowed evidence of the general reputation that land is owned by the person in possession where the possessor attempted to prove title by adverse possession. *Hedden v. Hall*, 453.

§ 25.1. Instructions

In an action to remove cloud on title on three tracts of property, trial court's instruction which was not limited to one parcel was prejudicial. *Cheek v. Lange*, 689.

APPEAL AND ERROR

§ 2. Matters Necessary to Determination of Appeal

Petitioner in a condemnation proceeding did not waive the right to appeal taxing of costs of expert witnesses by payment of such fees into court. *Redevelopment Comm. v. Weatherman*, 136.

§ 6. Orders Appealable

Trial court's order attempting to expunge defendant's appeal from an interlocutory child custody order on the ground that no appeal lay from such order was a nullity. *Boone v. Boone*, 680.

§ 16. Jurisdiction and Powers of Lower Court After Appeal

Court had no jurisdiction to rescind its judgment denying plaintiff's Rule 60 motion to set aside its dismissal of the action for lack of jurisdiction while an appeal from the judgment was pending. *Sink v. Easter*, 296.

While an appeal was pending from an interlocutory child custody order, trial court had no jurisdiction to entertain plaintiff's motion in the cause to have defendant's counsel appear and answer questions as to the whereabouts of defendant and the children. *Boone v. Boone*, 680.

§ 24. Form of and Necessity for Exceptions and Assignments of Error

Exceptions appearing only in purported assignments of error are ineffectual and will not be considered on appeal. *Moore v. Strickland*, 732.

§ 39. Time of Docketing

Trial judge had no authority to extend the time for docketing record on appeal by order entered after expiration of 90 days allowed by Rule 5. *Brown v. Smith*, 224; *Schafran v. Cleaners*, 367.

§ 48. Harmless and Prejudicial Error in Admission of Evidence

Plaintiff was not prejudiced by the admission of hearsay evidence as to the speed of defendant's truck where the jury answered the issue of defendant's negligence in plaintiff's favor. *Pope v. McLamb*, 666.

ARREST AND BAIL

§ 3. Right of Officer to Arrest Without Warrant

Officers had reasonable ground to believe that defendant was committing the felony of possession of heroin in their presence and that defendant would evade arrest if not immediately taken into custody. *S. v. Green*, 86.

§ 5. Method of Making Arrest and Force Permissible

Evidence was sufficient for the jury in an action to recover for policeman's assault on plaintiff in a jail cell after plaintiff's arrest for public drunkenness. *Todd v. Creech*, 537.

§ 11. Liabilities on Bail Bonds and Recognizances

The State could properly recover from defendant surety on an appearance bond where defendant failed to appear for a special session of court of which the surety had no notice, and subsequent apprehension of defendant did not discharge the surety's obligation. *S. v. Mills*, 485.

ASSAULT AND BATTERY

§ 3. Actions for Civil Assault

Evidence was sufficient for the jury in an action to recover for policeman's assault on plaintiff in a jail cell after plaintiff's arrest for public drunkenness. *Todd v. Creech*, 537.

While dispositions of the parties in a civil assault case may be shown by evidence of reputation when there is a plea of self-defense or an issue as to who committed the first act of aggression, testimony that defendants' reputations were "good, excellent" was not admissible. *Strickland v. Jackson*, 603.

§ 11. Indictment and Warrant

Variance between the indictment charging use of a rifle and evidence tending to show use of a shotgun was not material. *S. v. Jones*, 686.

§ 14. Sufficiency of Evidence

State's evidence was sufficient for the jury in a prosecution for felonious assault. *S. v. Spicer*, 364.

§ 15. Instructions

Defendant was not entitled to an instruction on self-defense where defendant brought on the difficulty with a highway patrolman. *S. v. Gatewood*, 211.

ASSIGNMENTS

§ 1. Rights Assignable

A valid assignment may be made of money to become due in the future. *Whitmire v. Savings & Loan Assoc.*, 39.

ATTACHMENT

§ 3. Attachment of Property of Nonresident

Attachment was proper in nonresident plaintiff's action to recover money judgment against a nonresident defendant. *Allen & O'Hara v. Wein-gart*, 676.

ATTACHMENT — Continued

§ 9. Dissolution of Attachment

When the defect alleged as grounds for a motion to dissolve an order of attachment appears on the face of the record, the court need not make findings of fact. *Allen & O'Hara v. Weingart*, 676.

ATTORNEY AND CLIENT

§ 7. Compensation and Fees

Trial court erred in determining counsel fees in a condemnation proceeding by taking one-third of the difference between what condemnor offered and the amount of the jury verdict. *Redevelopment Comm. v. Weatherman*, 136.

Trial court's conclusion that \$1900 was a reasonable fee for respondent's attorneys was not based on findings of fact supported by competent evidence. *Housing Authority v. Pelaez*, 702.

AUTOMOBILES

§ 3. Driving after Suspension of License

In a prosecution for driving while license was suspended, trial court properly permitted patrolman to testify he knew defendant's license had been suspended based upon a list of suspended licenses received by his patrol unit from DMV. *S. v. McDonald*, 286.

Fact that a notice of license suspension was produced by a machine and was not signed by an official of the DMV did not render it inadmissible. *Ibid.*

A licensed driver is not required by statute to give notice of change of address to the DMV. *Ibid.*

§ 45. Relevancy and Competency of Evidence in Negligence Action

Trial court properly admitted testimony that the witness met a tractor-trailer which was being operated in the center of the road 500 feet from the point of the collision. *McGrady v. Quality Motors*, 256.

§ 46. Opinion Testimony as to Speed

Testimony by a passenger that defendant was driving "a little too fast" was not admissible as a shorthand statement of fact. *Johnson v. Brooks*, 321.

§ 57. Exceeding Reasonable Speed at Intersection

Trial court erred in directing verdict for defendant in a wrongful death action where the evidence would support a jury finding that defendant's excessive speed at an intersection was the proximate cause of the collision. *Woodard v. Clay*, 153.

§ 58. Turning and Hitting Turning Vehicle

Plaintiff's evidence was sufficient for the jury where it tended to show defendant struck plaintiff's vehicle while turning right from a left turn lane. *Sidden v. Talbert*, 300.

§ 60. Skidding

Evidence that defendant's automobile skidded on ice was insufficient for the jury in a passenger's action. *Johnson v. Brooks*, 321.

AUTOMOBILES — Continued

§ 66. Identity of Driver

Plaintiff's evidence was insufficient to show defendant was the driver of a station wagon that struck a telephone pole causing wires to fall onto the highway in the path of plaintiff's vehicle. *Hoxeng v. Thomas*, 332.

§ 75. Contributory Negligence in Stopping or Parking

There was sufficient evidence to support findings that plaintiff's intestate was contributorily negligent in stopping her car on the highway after a friend motioned to her. *Spivey v. Walden*, 317.

§ 79. Contributory Negligence in Intersectional Accident

Trial court erred in directing verdict for defendant in a wrongful death action where the evidence did not compel a finding that plaintiff's intestate was contributorily negligent in entering an intersection. *Woodard v. Clay*, 153.

Plaintiff was contributorily negligent when he struck a police car which entered an intersection through a red light with its blue lights flashing. *Finch v. Merritt*, 527.

§ 83. Pedestrian's Contributory Negligence

Trial court properly granted defendant's motion for directed verdict where the evidence tended to show that plaintiff observed defendant's approaching vehicle but in disregard of it attempted to cross the road at a place other than a crosswalk. *Gentry v. Hackenberg*, 96.

Plaintiff pedestrian was not contributorily negligent as a matter of law in crossing an intersection in a marked crosswalk with the traffic signal in his favor. *Oliver v. Beasley*, 356.

§ 85. Contributory Negligence of Person on Bike

In an action for wrongful death of a child who was riding his mini-bike, trial court properly charged the jury on the presumption that a child between the ages of seven and fourteen is incapable of contributory negligence. *Pope v. McLamb*, 666.

§ 90. Instructions in Automobile Accident Cases

Trial court properly instructed the jury that a "do not pass" sign on the right at the approach of an intersection did not apply to a vehicle continuing down the right lane past another vehicle in a left turn lane. *Sidden v. Talbert*, 300.

§ 95. Negligence of Driver Imputed to Passenger

The driver's negligence was imputed to the owner who was a passenger in the vehicle. *Hearne v. Smith*, 111.

§ 117. Prosecutions for Speeding

Provisions of G.S. 20-141(c) requiring a motorist to reduce speed are constitutional. *S. v. Crabtree*, 491.

§ 125. Warrant for Operating Vehicle under Influence of Intoxicants

Where defendant was charged in the warrant with a second offense of drunken driving, reference to a prior offense when the warrant was read at the arraignment in the presence of prospective jurors prior to the solicitor's announcement that defendant would be tried only for a first

AUTOMOBILES — Continued

offense was proper, and the solicitor's reference to the warrant and prior offense while selecting the jury was not prejudicial. *S. v. Medlin*, 84.

§ 127. Sufficiency of Evidence in Prosecution Under G.S. 20-138

Evidence was sufficient to be submitted to the jury in a prosecution for driving under the influence. *S. v. Torrence*, 556.

AVIATION

§ 3. Injury to Persons in Flight

In an action to recover for death of passengers in a crash of a charter airplane, evidence was insufficient to support finding that failure of defendant's employee who arranged the flight to cancel the flight because of bad weather had some reasonable causal connection with the crash. *Hargett v. Air Service*, 636.

BOUNDARIES

§ 8. Proceedings to Establish

Allowance of defendant's motion for directed verdict on plaintiff's claim for damages for removal of timber did not prejudice her processioning proceeding to establish the true boundary line. *Hines v. Pierce*, 324.

When the trial court, before reviewing the report of the referee in a processioning proceeding, permitted defendant to amend his answer to deny plaintiff's title, the proceeding was converted into an action to try title, and the referee's report purporting to adjudge superior title in plaintiff could not be adopted by the trial court. *Reeves v. Musgrove*, 535.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence and Nonsuit

There was no fatal variance where the indictment alleged a breaking or entering with intent to steal a minibike owned by corporation and the evidence showed that the minibike was owned by an individual. *S. v. Rogers*, 142.

Evidence in a prosecution for felonious breaking and entering, including testimony of an accomplice, was sufficient to be submitted to the jury. *S. v. Mink*, 203.

Evidence was sufficient to withstand nonsuit where it tended to show that defendant entered an apartment and stole a TV. *S. v. Person*, 327.

State's evidence that defendant drove a getaway car was sufficient for the jury in a prosecution for breaking and entering and larceny. *S. v. Thompson*, 339.

§ 6. Instructions

Trial court's instructions were proper in a prosecution for breaking into a poultry cooler. *S. v. Hammond*, 544.

§ 7. Instructions as to Possible Verdicts

In a prosecution for felonious breaking and entering of a dwelling house with intent to commit larceny, trial court did not err in failing to instruct on the lesser included offense of non-felonious breaking and entering. *S. v. Coley*, 374.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 4. For Mutual Mistake

Contract for sale of land was not invalidated on the ground of mutual mistake where the purchaser acted under mistake of law in believing that a city traffic engineer had authority to issue a driveway permit for the property. *Financial Services v. Capitol Funds*, 377.

§ 7. Parties

An administratrix had the right to maintain an action to set aside a deed on the ground of fraud only if the administratrix was required to sell the real property in question to pay the obligations of the estate. *Wood v. Wood*, 352.

§ 8. Pleadings

Defendant's motion for summary judgment in an action to set aside a deed was properly granted where plaintiff's complaint was insufficient to show fraud, mistake or undue influence. *Carwell v. Worley*, 530.

COLLEGES AND UNIVERSITIES

Plaintiff's complaint failed to state a claim upon which relief could be granted where it showed that continuance of his employment after age 65 was a discretionary matter and the board of trustees did not exercise that discretion to offer plaintiff a job beyond his 67th birthday. *Lewis v. College*, 122.

CONSTITUTIONAL LAW

§ 30. Due Process in Trial

Defendant was not denied his right to a speedy trial when the judge extended the noon recess until he could conduct an unrelated hearing. *S. v. Crandall*, 625.

Defendant was not denied the right of a speedy trial on a secret assault charge by a 23 month delay between the offense and trial. *S. v. Hill*, 614.

§ 31. Right of Confrontation and Access to Evidence

In a prosecution for felonious distribution of amphetamines, trial court's failure to allow defendant's motion for an order directing SBI agents to release two of the tablets so she could have an independent analysis made of them was not error. *S. v. Splawn*, 14.

Defendant's right to have an SBI chemist testify against her only by appearing in person before the jury was a right which her counsel could waive in her behalf. *Ibid.*

Defendant failed to show sufficient need for informer's identity on ground that his testimony was needed on the question of ability of SBI agent to see defendant when defendant allegedly passed a package of heroin to another. *S. v. Ingram*, 186.

Defendant was not prejudiced by the admission of portions of an extrajudicial confession of a codefendant which inculpated defendant. *S. v. Arney*, 349.

CONSTITUTIONAL LAW — Continued

§ 32. Right to Counsel

Indigent defendant is entitled to a new trial where his right to counsel was abridged. *S. v. Chappell*, 200.

Defendant's constitutional right to counsel was not abridged when the court on 4 February found defendant was not an indigent and entitled to appointment of counsel and when the court on 6 February denied defendant's motion for continuance on the ground defendant had ample time following her indictment to employ counsel. *S. v. Grier*, 548.

§ 33. Self-incrimination

Evidence as to defendant's silence concerning items found in his automobile was properly permitted since there was nothing to indicate that defendant's silence followed any accusatory statement. *S. v. Mink*, 203.

Trial court's rulings upon questions asked a defense witness were for the protection of the witness's Fifth Amendment privilege against self-incrimination. *S. v. Crandall*, 625.

§ 34. Double Jeopardy

Defendant was not placed in double jeopardy by conviction of secret assault and felonious assault with a deadly weapon with intent to kill inflicting serious injury growing out of the same occurrence. *S. v. Hill*, 614.

CONTRACTS

§ 3. Definiteness and Certainty of Agreement

An agreement to execute a lease was not binding on defendant since the agreement failed to provide for the time and manner of payment of rent and the formal lease submitted by plaintiff contained provisions different from those in the agreement. *Smith v. House of Kenton Corp.*, 439.

§ 7. In Restraint of Trade

Provision of an insurance agency manager's agreement whereby the manager forfeits a monthly retirement allowance if he is licensed to sell or sells any kind of insurance in N. C. during the payment period set forth in the agreement is not against public policy and is valid. *Hudson v. Insurance Co.*, 501.

§ 12. Construction and Operation of Contracts Generally

Plaintiff's contention that his forced retirement prior to age 70 contravened the "common law" of defendant college was without merit since plaintiff's employment after age 65 could be continued under conditions which were set out in specific paper writings. *Lewis v. College*, 122.

§ 16. Conditions Precedent

Plaintiff failed to show that issuance of a driveway permit was a condition precedent of a contract for sale of land. *Financial Services v. Capitol Funds*, 377.

§ 18. Abandonment of Contract

Actions by child of testator who bid \$60 for a lot sold by executor amounted to an abandonment of the contract between the child and the executor. *Fisher v. Misenheimer*, 595.

CONTRACTS — Continued

§ 19. Novation and Substitution

Evidence on motion for summary judgment was insufficient to establish an issue of fact as to whether a third party had assumed defendant's responsibilities under the contract and plaintiff had acquiesced in this change of parties. *Electric Co. v. Housing, Inc.*, 510.

§ 24. Parties

Evidence that corporate president signed his name on a contract between the written corporate signature and his signature as president and that the word "owner" was printed on the form below his name was not sufficient to support a finding that the president executed the contract as an individual. *Industrial Air, Inc. v. Bryant*, 281.

§ 25. Pleadings

Plaintiff's complaint failed to state a claim upon which relief could be granted where it showed that continuance of his employment after age 65 was a discretionary matter and the board of trustees did not exercise that discretion to offer plaintiff a job beyond his 67th birthday. *Lewis v. College*, 122.

§ 26. Competency and Relevancy of Evidence

Trial court properly excluded parol evidence which changed the intent of the parties as expressed in their written agreement with respect to the selling of accounts receivable. *Corbin v. Langdon*, 21.

In an action to recover the balance allegedly due on the purchase of a house, price for which the buyer resold the house two years later was not competent. *Andrews v. Builders and Finance, Inc.*, 608.

§ 27. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to support trial court's finding that the parties had agreed on a final purchase price for a house of \$35,570. *Andrews v. Builders and Finance, Inc.*, 608.

§ 29. Measure of Damages for Breach of Contract

Plaintiffs' evidence was sufficient for the jury to determine the amount of their lost profits in an action for breach of contract to paint two houses, and plaintiffs' damages were not mitigated by the constant employment of plaintiffs by defendant. *McCullen v. Wel-Mil Corp.*, 736.

CORPORATIONS

§ 25. Contracts

Evidence that corporate president signed his name on a contract between the written corporate signature and his signature as president and that the word "owner" was printed on the form below his name was not sufficient to support a finding that the president executed the contract as an individual. *Industrial Air, Inc. v. Bryant*, 281.

COSTS

§ 4. Items of Cost and Amount of Allowance

Trial court in a condemnation proceeding erred in taxing costs of expert witnesses who were not under subpoena. *Redevelopment Comm. v. Weatherman*, 136.

COSTS — Continued

Trial court erred in determining counsel fees in a condemnation proceeding by taking one-third of the difference between what condemnor offered and the amount of the jury verdict. *Ibid.*

Where plaintiff failed to recover in an action involving title to real property in which a court survey was ordered, the trial court properly ordered the expense of the survey included in the costs taxed to the plaintiff. *Hines v. Pierce*, 324.

COUNTIES

§ 5. County Zoning

Developer of a lakeside campsite project made substantial expenditures in good faith prior to passage of a county zoning ordinance which would have prevented such project. *In re Campsites Unlimited*, 250.

COURTS

§ 2. Jurisdiction of Courts in General

The courts of this State obtained quasi in rem jurisdiction to adjudicate a cause of action arising wholly outside this State when a nonresident plaintiff attached the real property of a nonresident defendant located in this State. *Allen & O'Hara v. Weingart*, 676.

§ 6. Appeals to Superior Court from the Clerk

Plaintiff's appeal from an order of the clerk of superior court was made within the time allowed by statute and should have been heard by the superior court judge on its merits. *Hardware Co. v. Kilpatrick*, 116.

§ 11.1. Practice and Procedure in District Court

The rule that no appeal lies from an order of one district judge to another was inapplicable in this child custody proceeding. *Shook v. Peavy*, 230.

§ 14. Jurisdiction of Inferior Courts

Superior court erred in denial of plaintiff's motion to transfer to district court a motion to modify a child custody and support order entered in an action pending prior to the establishment of the district court. *Stanback v. Stanback*, 167.

CRIME AGAINST NATURE

§ 1. Elements of the Offense

The crime against nature statute is not unconstitutionally vague. *S. v. Kennedy*, 743.

§ 2. Prosecutions

Defendant was not prejudiced by court's refusal to allow a physician to give explanation for being unable to state a definite opinion in a crime against nature case. *S. v. Wilson*, 225.

CRIMINAL LAW

§ 7. Entrapment

Cross-examination of a State's witness about investigative methods generally used by undercover agents was not relevant to the defense of entrapment. *S. v. Crandall*, 625.

CRIMINAL LAW — Continued

Prosecution for possession and sale or delivery of MDA was properly submitted to the jury under appropriate instructions concerning entrapment. *Ibid.*

§ 21. Preliminary Proceedings

Trial court properly denied defendant's motion for a preliminary hearing after an indictment had been obtained. *S. v. Crandall*, 625.

§ 26. Plea of Former Jeopardy

"Same evidence" rule was not applicable in an armed robbery case where defendants had previously been tried and found guilty of robbing one victim and they were subsequently tried for robbery of a second victim. *S. v. Johnson*, 52.

Defendant was not placed in double jeopardy by conviction of secret assault and felonious assault with a deadly weapon with intent to kill inflicting serious injury growing out of the same occurrence. *S. v. Hill*, 614.

§ 34. Evidence of Defendant's Guilt of Other Offenses

Where defendant was charged in the warrant with a second offense of drunken driving, reference to a prior offense when the warrant was read at the arraignment in the presence of prospective jurors prior to the solicitor's announcement that defendant would be tried only for a first offense was proper, and the solicitor's reference to the warrant and prior offense while selecting the jury was not prejudicial. *S. v. Medlin*, 84.

Testimony by defendant's former wife that defendant had shot at her on a previous occasion was admissible to show defendant's state of mind. *S. v. Wilborn*, 99.

Evidence of defendant's participation in other crimes was admissible to show his association with the witness. *S. v. Grace*, 517.

Defendant in a narcotics case was not prejudiced by testimony that defendant had run a red light. *S. v. Zimmerman*, 396.

§ 42. Articles Connected with the Crime

Chain of custody of a white powder was sufficiently established to permit testimony identifying it as MDA. *S. v. Crandall*, 625.

§ 43. Photographs

Trial court did not err in allowing into evidence photographs of deceased in a murder prosecution. *S. v. Hudson*, 734.

§ 45. Experimental Evidence

Trial court in a murder case properly admitted experimental evidence that a weapon would not fire by being dropped onto a board from various heights unless the grip safety was depressed. *S. v. Jones*, 162.

§ 46. Flight of Defendant as Implied Admission

Trial court's instruction on flight was supported by evidence in a crime against nature prosecution. *S. v. Wilson*, 225.

Trial court did not err in failing to define the word "flight." *S. v. Geer*, 694.

§ 51. Qualification of Experts

Trial court did not express an opinion on the evidence by finding in the presence of the jury that a witness was an expert. *S. v. Crandall*, 625.

CRIMINAL LAW — Continued

Trial court properly allowed a heroin user to give an opinion that powder sold by defendant on an earlier occasion was heroin. *S. v. Barfield*, 619.

§ 52. Examination of Experts; Hypothetical Questions

Trial court properly permitted an SBI chemist to testify that his analysis of tablets showed them to contain amphetamine and methamphetamine rather than permitting the chemist to testify only as to his opinion as to what the tablets contained. *S. v. Splawn*, 14.

§ 58. Evidence in Regard to Handwriting

Trial court did not err in allowing testimony as to the signature on an assigned risk automobile policy. *S. v. Reid*, 194.

§ 60. Evidence in Regard to Fingerprints

Defendant was not prejudiced by admission of expert testimony concerning the presence of his fingerprints on a stolen automobile. *S. v. Franklin*, 93.

§ 64. Evidence as to Intoxication

Highway patrolman was properly allowed to testify to his opinion that defendant was under the influence of some type of drug. *S. v. Lindley*, 48.

§ 66. Evidence of Identity by Sight

Witness's in-court identification of defendant was based on the witness's acquaintance with defendant prior to the stabbing of deceased and was not tainted by a photographic identification at which only photographs of defendant and his brother were exhibited to the witness. *S. v. McMullin*, 90.

Trial court properly allowed in-court identification of defendant based on observations at the crime scene. *S. v. Johnson*, 52; *S. v. Nelson*, 458; *S. v. Richmond*, 683.

Witness's in-court identification of defendant was not tainted by any view she had of defendant while he was in custody of police officers. *S. v. Pittman*, 371.

Robbery victim's in-court identification of defendant was of independent origin and not tainted by an illegal pretrial lineup. *S. v. Montieith*, 498.

Trial court did not err in refusing to permit cross-examination of a witness concerning the appearance of skin color of individuals portrayed in black and white photographs used in a pretrial identification procedure. *S. v. Richmond*, 683.

§ 71. Shorthand Statement of Fact

An officer's references to defendant's "place of residence" were admissible as shorthand statements of fact. *S. v. Zimmerman*, 396.

§ 75. Test of Voluntariness of Confession and Admissibility

Question by 16-year-old defendant's mother as to whether she could get a lawyer for defendant did not constitute a request that interrogation cease until an attorney was present. *S. v. Rogers*, 142.

The evidence supported trial court's determination that officers did not tell defendant that he would receive a lighter sentence if he signed a confession. *Ibid*.

CRIMINAL LAW — Continued

Trial court properly admitted statements which had been volunteered by defendant. *S. v. Zimmerman*, 396.

Defendant's volunteered statements to a deputy sheriff and his statements to an FBI agent after waiver of rights were admissible. *S. v. Massey*, 721.

§ 76. Determination and Effect of Admissibility of Confession

Defendant was not prejudiced by the admission of portions of an extrajudicial confession of a codefendant which inculpated defendant. *S. v. Arney*, 349.

§ 77. Admissions and Declarations

Admission of defendant to an arresting officer that a car containing one gallon of taxpaid liquor for sale was his was sufficient to show ownership of the vehicle in defendant. *S. v. Reid*, 194.

§ 80. Books, Records and Private Writings

A law enforcement agent was properly allowed to refer to notes taken during an investigation to improve his recollection. *S. v. Johnson*, 52.

In a prosecution for felonious distribution of amphetamines, trial court's failure to allow defendant's motion for an order directing SBI agents to release two of the tablets so she could have an independent analysis made of them was not error. *S. v. Splawn*, 14.

Defendant was not entitled to examine practically the complete files of the investigating officers and of the solicitor. *S. v. Kaplan*, 410.

Trial court did not err in refusing cross-examination of two officers as to written reports filed by them. *S. v. Jones*, 686.

§ 84. Evidence Obtained by Searches and Seizures

Officer who was lawfully in defendant's car properly searched the front seat without a warrant after having seen defendant conceal something in the seat. *S. v. Zimmerman*, 396.

§ 85. Character Evidence Relating to Defendant

Defendant was not prejudiced by SBI agent's testimony that he might have come across defendant's name in the intelligence files. *S. v. Ingram*, 186.

§ 86. Credibility of Defendant

Trial court properly permitted the solicitor to ask defendant on cross-examination for impeachment purposes whether she possessed and sold amphetamine tablets and other drugs on dates unrelated to the present case. *S. v. Splawn*, 14.

Trial court properly allowed district attorney to use a signed statement made by defendant for the purpose of impeachment. *S. v. Nelson*, 458.

§ 87. Direct Examination of Witnesses

Trial court in an armed robbery case did not abuse its discretion in allowing leading questions. *S. v. Wortham*, 262.

§ 88. Cross-examination

Trial court did not err in refusing to allow defendant to recross-examine a State's witness. *S. v. Wortham*, 262.

CRIMINAL LAW — Continued

§ 89. Credibility of Witness; Corroboration and Impeachment

The jury was adequately informed that the State introduced evidence of prior crimes solely for the purpose of impeaching defendant's credibility. *S. v. Reid*, 194.

The trial court did not err in the exclusion of testimony allegedly admissible to corroborate defendant's testimony where defendant had not yet testified at the time the testimony was offered. *S. v. Gatewood*, 211.

State's cross-examination of a defense witness on details of prior convictions and of defendant on a previous prison term was not improper. *S. v. Crandall*, 625.

§ 91. Time of Trial and Continuance

Trial court did not err in denying defendant's motion for continuance based on incidents arising at the trial. *S. v. Franklin*, 93.

Trial court properly denied defendant's motion for continuance to obtain witnesses. *S. v. Rice*, 182.

Trial court properly denied defendant's motion for continuance based upon absence of a witness. *S. v. Nelson*, 458.

Where defendant was charged in separate indictments with secret assault and with felonious assault, trial court did not err in denial of defendant's motion for continuance of the felonious assault case made on the ground the indictment in such case was returned just one day prior to trial. *S. v. Hill*, 614.

§ 92. Consolidation of Counts

Trial court did not abuse its discretion in consolidating defendant's case with that of another person charged with the same crime. *S. v. Arney*, 349.

Charges of armed robbery, breaking or entering and larceny were properly consolidated for trial. *S. v. Byrd*, 718.

§ 93. Order of Proof

It is within the trial judge's discretion to determine the order of proof. *S. v. Johnson*, 52.

§ 97. Introduction of Additional Evidence

So long as defendant has an opportunity to offer evidence in rebuttal, the court has discretion to reopen a case for additional testimony up until the jury returns. *S. v. Perry*, 190.

§ 98. Custody of Witnesses

Sequestration of witnesses is a discretionary matter. *S. v. Green*, 86.

Trial court did not abuse its discretion in denying defendant's motion to sequester witnesses. *S. v. Hudson*, 734.

§ 99. Conduct of Court and its Expression of Opinion on Evidence During Trial

Trial court did not express an opinion regarding the credibility of a defense witness where the judge attempted to clarify a question. *S. v. Wortham*, 262; *S. v. McDonald*, 286.

Defendant is entitled to a new trial where the trial court questioned witnesses extensively and sustained his own objections to testimony of defendant. *S. v. Steele*, 524.

CRIMINAL LAW — Continued

Trial court did not express an opinion on the evidence by finding in the presence of the jury that a witness was an expert. *S. v. Crandall*, 625.

Trial court did not express an opinion on the evidence when, during cross-examination of a store manager, the court stated, "Let him finish. Tell him how you can identify those Timex watches." *S. v. Hickman*, 662.

Trial court did not express an opinion when defense counsel began a question with "It is possible, is it not" and the court stated, "Let's not get into possibilities." *Ibid*.

§ 101. Custody and Conduct of Jury

Trial court properly denied motion for jury view of the scene where defendant allegedly sold heroin. *S. v. Ingram*, 186.

§ 102. Argument and Conduct of Counsel or Solicitor

Defendant failed to show any impropriety in the district attorney's use of the word "thieves," "rogues," and "scoundrels" when referring to defendants in his jury argument. *S. v. Wortham*, 262.

Defendant was not prejudiced by the solicitor's use of defendant's testimony in phrasing a question to a witness. *S. v. Sutton*, 365.

Evidence supported the solicitor's argument that defendant would also have killed a friend of deceased who was present at the shooting had his pistol contained additional bullets. *S. v. Geer*, 694.

§ 107. Nonsuit for Variance

There was a fatal variance between the indictment charging uttering a forged check and proof of uttering a check with a forged endorsement. *S. v. Daye*, 267.

§ 112. Instructions on Burden of Proof and Presumptions

Trial court was not required to charge on the presumption of innocence. *S. v. McDonald*, 286.

Trial judge was not required to give an instruction on circumstantial evidence absent a request therefor. *S. v. Arney*, 349.

In the absence of a request, the trial judge was not required to define the terms "reasonable doubt" and "wilfulness." *S. v. Perry*, 190.

Trial court did not err in failing to give tendered instruction concerning the presumption of innocence and "continuation of the presumption throughout the course of the trial." *S. v. Geer*, 694.

§ 113. Statement of Evidence and Application of Law Thereto

Trial court is not required to instruct on alibi absent a request therefor. *S. v. Rogers*, 142; *S. v. Richmond*, 683.

Trial court's instructions as to the doctrine of flight pertained to one defendant only and the other two defendants were not prejudiced thereby. *S. v. Brown*, 291.

In the joint trial of two defendants, trial court's instructions as to guilt or innocence of each defendant were proper. *S. v. Glenn*, 541.

Trial court is not required to summarize the evidence to the jury. *S. v. Joyner*, 741.

Trial court did not err in failing to define the word "flight." *S. v. Geer*, 694.

CRIMINAL LAW — Continued

In the absence of a request, the trial court was not required to instruct the jury that they must use their own memory in recalling the evidence. *S. v. Chappell*, 228.

§ 114. Expression of Opinion by Court on Evidence in the Charge

Trial court's reference to the wrong day of the week while recapitulating defendant's alibi evidence was not prejudicial error. *S. v. Splawn*, 14.

Trial court's instruction to the jury that he possessed an opinion about the case but it would be highly improper for him to try to convey it to them did not prejudice defendant. *S. v. Reid*, 194.

Trial court did not express an opinion in using the words "it therefore appears" in summarizing defendant's driving record which had been introduced in evidence. *S. v. McDonald*, 286.

Trial court's slip of the tongue in stating that the State offered further evidence tending to show "and does show" was not prejudicial error. *S. v. Montieth*, 498.

Trial court's reference in its instructions to the State's contention that the victim had been shot in the back two times did not constitute an expression of opinion. *S. v. Hargett*, 709.

§ 116. Charge on Failure of Defendant to Testify

Trial court's instruction concerning defendant's failure to testify was sufficient. *S. v. McDonald*, 286; *S. v. Brewer*, 543.

§ 122. Additional Instructions After Initial Retirement of Jury

Where the jury was unable to agree on a verdict before the evening recess, trial court's comment, "How come everybody got so stubborn? That other jury hasn't agreed yet," did not constitute an expression of opinion. *S. v. Lindley*, 48.

In complying with the jury's request to define again the difference between murder in the second degree and manslaughter, trial court was not required to repeat his entire charge. *S. v. Hamilton*, 311.

Additional instructions given the jury after their initial retirement did not coerce the jury into returning a verdict of guilty. *S. v. Person*, 327.

Trial court did not coerce a verdict in urging the jury to go back and deliberate further. *S. v. Carr*, 546.

Trial court was not required to repeat its instructions on reasonable doubt in giving additional instructions to the jury. *S. v. Hammond*, 544.

Trial court did not err in failing to repeat its instructions on self-defense when the jury asked for additional instructions on the element of intent. *S. v. Hargett*, 709.

§ 124. Sufficiency of Verdict

Jury's verdict of "guilty as charged" was sufficient. *S. v. Joyner*, 741.

§ 138. Determination of Severity of Sentence

Trial court did not err in allowing hearsay testimony of defendant's reputation for dealing in heroin at defendant's sentencing hearing upon conviction for promoting a lottery. *S. v. Dawson*, 712.

CRIMINAL LAW — Continued

§ 143. Revocation of Suspension of Judgment or Sentence

Evidence supported finding that defendant violated a condition of his suspended sentence that he not possess any liquor or beer. *S. v. Duffey*, 515.

Trial judge could properly activate a suspended sentence on his own independent judgment by reason of certain conduct after the solicitor had entered nolle prosequis on charges resulting from the same conduct. *S. v. Debnam*, 478.

Evidence was sufficient to support trial court's revocation of defendant's suspension for violation of probation conditions. *S. v. Johnson*, 696.

§ 145.1. Probation

Defendant's probation was properly revoked on the ground that defendant changed his place of residence without advising his probation officer. *S. v. Byrd*, 63.

A judge activating a probationary sentence has no authority to cause such sentence to run consecutively to a sentence imposed on defendant after the trial at which the probationary sentence was imposed. *Ibid.*

Evidence supported revocation of defendant's probation for violation of his curfew, taking an overdose of drugs, and being in arrears in payment of a fine. *S. v. Stone*, 344.

§ 146. Nature and Grounds of Appellate Jurisdiction

A prayer for judgment continued is not a final judgment which can be appealed. *S. v. Bryant*, 373.

Defendant's appeal is dismissed where he had escaped while serving a sentence imposed for conviction of another crime. *S. v. Page*, 538.

§ 157. Necessary Parts of Record Proper

Appeal is dismissed for failure of record to show how superior court obtained jurisdiction of a misdemeanor. *S. v. Hawley*, 223.

§ 161. Necessity for and Requisites of Exceptions

An appeal is an exception to the judgment and presents the face of the record proper for review. *S. v. Dockery*, 544.

§ 162. Motions to Strike

Defendant should have moved to strike objectionable portions of the witness's answer. *S. v. McMullin*, 90.

§ 163. Exceptions and Assignments of Error to Charge

Defendant was not prejudiced by the misstatement of evidence in the trial court's charge to the jury where such error was not called to the attention of the court during the trial. *S. v. Mink*, 203.

§ 164. Exceptions and Assignments of Error to Refusal of Motion for Nonsuit

Defendant cannot contend on appeal that the trial court erred in not allowing his motion for nonsuit made after the State had rested where defendant thereafter took the stand in his own behalf. *S. v. Perry*, 190.

§ 165. Exceptions to Solicitor's Argument

Objections to portions of the State's argument to the jury should be made before the case is submitted to the jury. *S. v. Mink*, 203.

CRIMINAL LAW — Continued

§ 166. The Brief

Assignments of error not argued in defendant's brief are deemed abandoned. *S. v. Hall*, 553.

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

Admission of a pocketknife taken from defendant at the time of his arrest but not connected with the crime, if erroneous, was not prejudicial. *S. v. McMullin*, 90.

Question put to a witness was not reviewable on appeal since the record did not show what the answer would have been. *S. v. Perry*, 190.

Defendant was not prejudiced where the trial court allowed a prosecuting witness to recount a statement by a codefendant made in defendant's absence. *S. v. Wortham*, 262.

CUSTOMS AND USAGES

Plaintiff's contention that his forced retirement prior to age 70 contravened the "common law" of defendant college was without merit since plaintiff's employment after age 65 could be continued under conditions which were set out in specific paper writings. *Lewis v. College*, 122.

DAMAGES

§ 5. Damages for Injury to Real Property

Trial court properly instructed the jury on the loss of use damages in an action to recover for injuries to plaintiff's residence. *Huff v. Thornton*, 388.

§ 9. Mitigation of Damages

In an action for breach of contract for plaintiffs to paint two houses, damages suffered by plaintiffs were not mitigated by the constant employment of plaintiffs by defendant. *McCullen v. Wel-Mil Corp.*, 736.

§ 13. Competency and Relevancy of Evidence on Issue of Compensatory Damages

Trial court properly allowed a witness to express an opinion as to the fair market value of plaintiffs' house immediately before it was struck by defendants' vehicle. *Huff v. Thornton*, 388.

§ 14. Competency and Relevancy of Evidence on Issue of Punitive Damages

Evidence that defendants in an assault case had transferred land to one defendant's wife after the action was commenced was competent upon the question of defendants' ability to respond in punitive damages. *Strickland v. Jackson*, 603.

§ 15. Burden of Proof and Sufficiency of Evidence as to Damages

Plaintiff's evidence was sufficient for the jury on the issue of damages from loss of use of a vehicle used to transport plaintiff's wife to and from work. *Ling v. Bell*, 10.

DAMAGES — Continued

Evidence was sufficient to withstand motion for directed verdict in an action to recover damages sustained by plaintiffs when defendants' truck struck their residence. *Huff v. Thornton*, 388.

Plaintiff's evidence was sufficient for the jury to determine the amount of their lost profits in an action for breach of contract to paint two houses. *McCullen v. Wel-Mil Corp.*, 736.

§ 16. Instructions on Measure of Damages

Trial court's instructions on reasonable time for repair were insufficient in an action to recover for loss of use of a vehicle. *Ling v. Bell*, 10.

DEATH

§ 3. Nature and Grounds of Action for Wrongful Death

Widow could not execute release from wrongful death claim which is binding on the deceased husband's estate prior to the time she is appointed personal representative of the estate. *Todd v. Adams*, 104.

DEEDS

§ 7. Registration

Sale of land by reference to an unapproved plat did not render contract of sale void or voidable. *Financial Services v. Capitol Funds*, 377.

§ 20. Restrictive Covenants as Applied to Subdivision Developments

There was no basis to infer from the language of restrictive covenants in the deed from Starmount Company that it intended to covenant that it would enforce restrictive covenants and thus protect the interests of plaintiffs who purchased the land in a subdivision. *Shipton v. Barfield*, 58.

§ 23. Covenants of Quiet Enjoyment and Warranty of Title

Subdivision control ordinance was not an encumbrance on title, and failure by the seller of the land to obtain city council approval of a plat filed pursuant to the ordinance did not constitute a breach of covenant of warranty. *Financial Services v. Capitol Funds*, 377.

DIVORCE AND ALIMONY

§ 16. Alimony Without Divorce

Evidence was sufficient to support the trial court's award of attorney fees. *Little v. Little*, 107.

Trial court did not exceed its authority in ordering that monthly alimony be paid by defendant to the holder of a mortgage on the home owned by the parties. *Yearwood v. Yearwood*, 532.

§ 17. Alimony Upon Divorce from Bed and Board

Award of alimony to the wife must be set aside where it was based on the husband's capacity to earn rather than his actual earnings. *Bowes v. Bowes*, 70.

DIVORCE AND ALIMONY — Continued**§ 18. Alimony and Subsistence Pendente Lite**

Court's findings did not support award of alimony pendente lite to the wife where daughter became 18 years of age pending appeal of the order and the court made no finding as to the wife's separate expenses. *Painter v. Painter*, 220.

Spouse not entitled to alimony pendente lite is not entitled to counsel fees. *Ibid.*

Trial court did not err in granting plaintiff alimony pendente lite where there was evidence that plaintiff was entitled to the relief demanded, nor did the court err in ordering defendant to transfer title to a vehicle to plaintiff. *Yearwood v. Yearwood*, 532.

§ 19. Modification of Decree

Order modifying previous child custody orders is vacated where it was entered without notice to defendant. *Nowell v. Nowell*, 117.

§ 22. Jurisdiction and Procedure in Custody and Support of Children

Superior court erred in denial of plaintiff's motion to transfer to district court a motion to modify a child custody and support order entered in an action pending prior to the establishment of the district court. *Stanback v. Stanback*, 167.

Trial court in an action to modify a child custody and support order erred in allowance of a motion that plaintiff be required to produce his check stubs, cancelled checks and bank statements. *Ibid.*

The evidence did not support court's finding that defendant mother had insufficient means to defray the expenses of a hearing on a motion to modify child custody and support order. *Ibid.*

§ 23. Support of Children

Since child support may include shelter, trial court properly awarded plaintiff, who was given custody of the minor children, exclusive possession of the homeplace. *Boulware v. Boulware*, 102.

The correctness of a child support order is moot where the child became 18 years of age while appeal from the order was pending. *Painter v. Painter*, 220.

Findings of fact by the trial court were sufficient to support its award of child support. *Pendergraft v. Pendergraft*, 307.

Award of counsel fees was proper in a custody and support case. *Ibid.*

§ 24. Custody of Children

A parent who commits adultery does not by this fact alone become unfit to have custody of children. *Pendergraft v. Pendergraft*, 307.

Parties consented to trial court's modification of defendant's visitation privileges without a showing of change of condition. *Clark v. Clark*, 589.

ELECTIONS**§ 7. Procedure in Contested Elections**

State Board of Elections may act on a protest though it was not timely filed or may take action on its own motion in the absence of any protest. *Sharpley v. Board of Elections*, 650.

ELECTIONS — Continued

§ 10. Sufficiency of Evidence, Issues and Judgment

State Board of Elections had authority to order a new election for five offices of town commissioner without also ordering a new election for the office of mayor or treasurer. *Sharpley v. Board of Elections*, 650.

EMINENT DOMAIN

§ 1. Nature and Extent of Power

Plaintiffs acted under statutory authority in seeking to have condemned for an urban renewal project a parcel of land which included tracts already in public ownership. *Redevelopment Comm. v. Unco, Inc.*, 574.

§ 6. Evidence of Value

In an action to determine compensation for land condemned by a city for a sewer outfall line, trial court erred in admission on the question of damages of evidence concerning overflow of a manhole in the sewer line after its installation. *City of Greensboro v. Sparger*, 81.

Trial court properly excluded evidence of sales price of nearby tract which was only 1/5 the size of the condemned land. *Redevelopment Comm. v. Weatherman*, 136.

Trial court in a proceeding to condemn an easement erred in disallowing evidence showing what respondents paid for the parcel of land in question not more than 15 months before the taking. *Power Co. v. Busick*, 276.

Trial court's colloquy with a witness strengthened the witness's testimony as to value and thereby amounted to an expression of opinion by the judge. *Ibid.*

The record fails to show that witness's opinion as to the value of condemned land was based in part on sales of land to the condemnor made under threat of condemnation. *City of Charlotte v. Hudson*, 337.

§ 7. Proceedings to Take Land and Assess Compensation

Trial court properly admitted maps for illustration only in a proceeding to condemn an easement. *Power Co. v. Busick*, 276.

Trial court did not err in failing to state the date of the taking in its instruction on determining market value. *City of Charlotte v. Hudson*, 337.

Plaintiff did not act arbitrarily or capriciously in adopting and approving a plan of redevelopment or the amendment to include the parcel of which appellants' land was a part. *Redevelopment Comm. v. Unco, Inc.*, 574.

ESTATES

§ 3. Nature and Incidents of Life Estates and Remainders

Action for the establishment of plaintiffs' title to land devised by their grandfather to their grandmother and mother "for their lifetime" is remanded for a hearing on the merits. *McRorie v. Query*, 601.

EVIDENCE

§ 12. Communications Between Husband and Wife

A divorced spouse may testify as to her adultery with defendant in an action for alienation of her affections brought by her former husband. *Golding v. Taylor*, 171.

§ 19. Evidence of Similar Facts

Trial court properly admitted testimony that the witness met a tractor-trailer which was being operated in the center of the road 500 feet from the point of the collision. *McGrady v. Quality Motors*, 256.

§ 24. Depositions

A deposition was properly admitted in evidence where the court found that the witness resided more than 75 miles from the place of trial and was ill and could not attend court. *Golding v. Taylor*, 171.

Trial court did not err in admission of a deposition over objection that a new attorney was employed just before the deposition was taken and had had no opportunity to prepare for it. *Ibid.*

§ 25. Photographs

Trial court did not err in failing to instruct that a photograph was admitted for illustrative purposes only. *Sidden v. Talbert*, 300.

§ 29. Accounts, Ledgers, and Private Writings

In an action to recover balance due on an account, a copy of a receipt from plaintiff's receipt book and certain ledger sheets were properly admitted in evidence. *Oil Co. v. Horton*, 551.

Trial court properly permitted a doctor to testify from notes which did not refresh his recollection rather than requiring the notes to be placed in evidence. *Johnson v. Johnson*, 449.

§ 42. Nonexpert Opinion as Constituting Shorthand Statement of Fact

Testimony by a passenger that defendant was driving "a little too fast" was not admissible as a shorthand statement of fact. *Johnson v. Brooks*, 321.

§ 45. Nonexpert Opinion as to Value

In an action to recover on a note, the trial court erred in not admitting defendant's testimony placing a value on the collateral. *Watts v. Todd*, 737.

§ 48. Competency and Qualification of Experts

Trial court properly allowed testimony of an expert witness where defendants failed to object specifically thereto. *Hedden v. Hall*, 453.

Defendants waived objection to the qualifications of a police officer to give expert testimony by failing to object specifically to his qualifications. *Strickland v. Jackson*, 603.

§ 50. Medical Testimony

Trial court properly refused to strike a physician's response to a hypothetical question that it is "possible" that blows to plaintiff's knees could have produced the symptoms which she now manifests. *McGrady v. Quality Motors*, 256.

Trial court erred in allowing a medical expert witness to answer a hypothetical question which did not include pertinent and necessary facts. *Dean v. Coach Co.*, 470.

EVIDENCE — Continued

Plaintiff was not prejudiced by the admission of a doctor's conclusions as to primary and secondary gains that a patient seeks in exhibiting post-traumatic neurosis. *Johnson v. Johnson*, 449.

§ 54. Testimony in Regard to Physics

Trial court properly excluded expert testimony as to the momentum of a tractor-trailer where the testimony was based on a hypothetical question which failed to include pertinent facts. *Johnson v. Johnson*, 449.

§ 56. Expert Testimony as to Value

Trial court properly allowed a witness to express an opinion as to the fair market value of plaintiffs' house immediately before it was struck by defendants' vehicle. *Huff v. Thornton*, 388.

EXECUTION

§ 1. Property Subject to Execution

Proceeds of entirety property were subject to execution in an action against the husband alone, but the judgment creditor was not entitled to have a receiver appointed to take possession of the land itself in order to rent it and apply the rentals to payment of the judgment. *Produce v. Massengill*, 368.

EXECUTORS AND ADMINISTRATORS

§ 6. Title and Control of Assets

An administratrix had the right to maintain an action to set aside a deed on the ground of fraud only if the administratrix was required to sell the real property in question to pay the obligations of the estate. *Wood v. Wood*, 352.

FORGERY

§ 2. Prosecution and Punishment

Indictment charging forgery which set out the full wording of the checks and endorsements was sufficient to charge the crime. *S. v. McAllister*, 359.

Indictments charging defendant with uttering forged checks which alleged "an intent to defraud" were sufficient although they did not allege to whom the checks were uttered. *Ibid.*

In order for a bill of indictment sufficiently to charge the offense of uttering an instrument with a forged endorsement, the instrument should be attached or the bill itself should specifically describe the instrument, and the bill should allege the endorsement was forged and that the accused knowingly uttered the instrument with the forged endorsement. *S. v. Daye*, 267.

There was a fatal variance between the indictment charging uttering a forged check and proof of uttering a check with forged endorsement. *Ibid.*

FRAUDS, STATUTE OF

§ 2. Sufficiency of Writing

A revoked will in which testator agreed to devise property to plaintiffs' mother was a sufficient memorandum of the agreement between testator and plaintiffs' mother to comply with the Statute of Frauds. *Rape v. Lyerly*, 241.

GAMBLING

§ 3. Lotteries

State's evidence was sufficient for the jury in a prosecution for promoting a lottery. *S. v. Dawson*, 712.

HOMICIDE

§ 9. Self-defense

Placing the burden on defendant to prove to the jury's satisfaction that he acted in self-defense does not relieve the State of the burden of proving criminality. *S. v. Harris*, 77.

§ 15. Relevancy and Competency of Evidence

Defendant was not prejudiced when the solicitor was permitted to ask him what he weighed. *S. v. Harris*, 77.

§ 20. Demonstrative Evidence; Physical Objects

Defendant was not prejudiced by testimony about an unauthenticated photograph shown a witness for the purpose of refreshing his recollection. *S. v. Harris*, 77.

Admission of a pocketknife taken from defendant at the time of his arrest but not connected with the crime, if erroneous, was not prejudicial. *S. v. McMullin*, 90.

§ 21. Sufficiency of Evidence and Nonsuit

Trial court was not required to consider evidence of self-defense in ruling on defendant's motion for nonsuit. *S. v. Hamilton*, 311.

§ 24. Instructions on Presumptions and Burden of Proof

Trial court's instructions on presumptions of unlawfulness and malice arising from the showing of a death caused by the intentional use of a deadly weapon were proper without additional instruction that no such presumptions arise if the State's evidence shows the killing was in self-defense. *S. v. Harris*, 77.

§ 26. Instructions on Second Degree Murder

It was not necessary for the court to instruct on foreseeability as an element of proximate cause in a prosecution for second degree murder by shooting with a pistol. *S. v. Jones*, 162.

§ 27. Instructions on Manslaughter

Trial court's instruction to the jury that "in order to reduce the crime to manslaughter, the defendant must prove, not beyond a reasonable doubt, but simply to your satisfaction, that there was no malice on his part" was proper. *S. v. Hamilton*, 311.

HOMICIDE — Continued

§ 28. Instructions on Defenses

Placing of the burden on defendant to prove to the jury's satisfaction that he acted in self-defense does not relieve the State of the burden of proving criminality. *S. v. Harris*, 77.

§ 30. Submission of Question of Guilt of Lesser Degrees of the Crime

Error, if any, in submission of an issue of the lesser included offense of involuntary manslaughter was favorable to defendant and he cannot complain thereof. *S. v. Harris*, 77; *S. v. Jones*, 162.

HUSBAND AND WIFE

§ 6. Right to Testify For or Against Spouse

A divorced spouse may testify as to her adultery with defendant in an action for alienation of her affections brought by her former husband. *Golding v. Taylor*, 171.

§ 10. Requisites and Validity of Separation Agreement

Evidence was sufficient to support trial court's finding that the wife signed under duress a separation agreement by which the husband claimed sole ownership of the real property in question. *Fletcher v. Fletcher*, 207.

A certificate of privy examination of a wife may be impeached for fraud. *Ibid.*

§ 15. Nature and Incidents of Estate by Entireties

Proceeds of entirety property were subject to execution in an action against the husband alone, but the judgment creditor was not entitled to have a receiver appointed to take possession of the land itself in order to rent it and apply the rentals to payment of the judgment. *Produce v. Massengill*, 368.

§ 25. Competency and Sufficiency of Evidence of Alienation

A divorced spouse may testify as to her adultery with defendant in an action for alienation of her affections brought by her former husband. *Golding v. Taylor*, 171.

In an action for alienation of affections of plaintiff's wife, the trial court properly admitted evidence as to defendant's claims of other extra-matrimonial conquests. *Ibid.*

INDICTMENT AND WARRANT

§ 9. Charge of Crime

Although an indictment for a statutory offense is generally sufficient if the indictment is framed in the words of the statute, it is necessary to supplement those words when they are insufficient to apprise the accused of the charge against him. *S. v. Daye*, 267.

§ 10. Identification of Accused

Defendant was not prejudiced by reference in the indictments to an alias. *S. v. Splawn*, 14.

§ 13. Bill of Particulars

Evidence presented by the State was within the limits of the transactions set out in the bill of particulars and did not deprive defendant of a fair defense. *S. v. Conner*, 723.

INFANTS

§ 9. Hearing and Grounds for Awarding Custody of Minor

Evidence did not support an order taking custody from the mother and placing custody in the grandmother. *In re Wehunt*, 113.

Definitions of custodian and person in loco parentis. *Shook v. Peavy*, 230.

Parents were not entitled to custody of their children where there was no showing of changed circumstances. *Dept. of Social Services v. Roberts*, 513.

§ 10. Commitment of Minors for Delinquency

Proof beyond a reasonable doubt is required in a juvenile delinquency proceeding and such proof was not given in a proceeding charging the infant with larceny from a supermarket. *In re Gooding*, 520.

§ 11. Abuse and Neglect of Child

Plaintiffs who were custodians of the child whose custody was in issue had a right to be heard at the hearing to determine neglect of the child. *Shook v. Peavy*, 230.

INJUNCTIONS

§ 7. To Restrain Use of Land

Trial court erred in granting a temporary injunction to restrain interference with erection and maintenance of a replacement boundary fence. *Hutchins v. Stanton*, 467.

INSURANCE

§ 2. Brokers and Agents

Provision of an insurance agency manager's agreement whereby the manager forfeits a monthly retirement allowance if he is licensed to sell or sells any kind of insurance in N. C. during the payment period set forth in the agreement is not against public policy and is valid. *Hudson v. Insurance Co.*, 501.

§ 14. Provisions Excluding Liability if Death Results from Stipulated Causes

Trial court should have charged the jury that a provision excluding double indemnity for a death resulting from "injuries sustained by the insured while intoxicated" would preclude recovery even though there was no causal relation between the intoxication and death. *Benson v. Insurance Co.*, 481.

Life insurance coverage was not excluded where insured died as the result of an accidental gunshot wound inflicted by one who later pleaded guilty to a charge of involuntary manslaughter. *Hicks v. Insurance Co.*, 725.

§ 35. Right to Proceeds Where Beneficiary Causes Death of Insured

A wife convicted of involuntary manslaughter of her husband was not a "slayer" who is barred from receiving the proceeds of a policy of insurance on her husband. *Quick v. Insurance Co.*, 504.

§ 79.1. Automobile Liability Insurance Rates

Commissioner of Insurance had no authority to order the establishment of a premium rate classification plan for automobile liability insur-

INSURANCE — Continued

ance not based in whole or in part on age and sex of the driver insured. *Comr. of Insurance v. Automobile Rate Office*, 475.

§ 80. Vehicle Financial Responsibility Act

The primary purpose of the Financial Responsibility Act is to assure that innocent victims of financially irresponsible motorists are compensated. *Insurance Co. v. Insurance Co.*, 715.

§ 90. Limitations on Use of Vehicle

Provision in defendant's policy which excluded insurance on the liability of those operating under lease from defendant's insured was not void for violation of the Financial Responsibility Act. *Insurance Co. v. Insurance Co.*, 715.

§ 135. Subrogation Claim of Insurer

Evidence supported court's finding that defendant accepted a settlement in a negligence action for a fire loss with knowledge that it included the subrogation claim of plaintiff insurer. *Insurance Co. v. Clark*, 304.

§ 148. Title Insurance

Failure of seller of land to obtain city council approval of a plat filed pursuant to a subdivision control ordinance did not constitute a defect in or lien or encumbrance on title or render the title unmarketable within the meaning of a title insurance policy. *Financial Services v. Capitol Funds*, 377.

Provision of a title insurance policy insuring against loss resulting from lack of right of access to and from the land was inapplicable where the landowner was unable to obtain a driveway permit for commercial property but there was full pedestrian access to and from the property. *Ibid.*

INTOXICATING LIQUOR

§ 2. Duties and Authority of ABC Board; Beer and Wine Licenses

Beer and liquor permits were properly suspended on grounds that licensee failed to have alcoholic beverages stored in individual lockers and failed to keep current roster of all members. *Parker v. Board of Alcoholic Control*, 330.

Statutes are not unconstitutionally vague in failing to advise the holder of an on-premises beer permit what constitutes "lewd, immoral, or improper entertainment, conduct, or practices" and what constitutes "proper supervision" of the premises. *McKinney v. Board of Alcoholic Control*, 369.

Evidence that defendant sold a six-pack of beer on Sunday was sufficient to support revocation of his beer license. *Perry v. Board of Alcoholic Control*, 118.

§ 12. Competency and Relevancy of Evidence of Liquor Violation

Defendant, in a prosecution for possession of taxpaid liquor for the purpose of sale, failed to show that the admission of testimony concerning a firearm found in his car prejudiced him. *S. v. Reid*, 194.

JUDGMENTS

§ 36. Parties Concluded

Res judicata was inapplicable in this action where there was no identity of parties between this action and an earlier one. *Thompson v. Hamrick*, 550.

§ 37. Matters Concluded in General

Where the Supreme Court ruled that respondents were entitled to a directed verdict unless superior court allowed a motion for voluntary dismissal without prejudice, such motion was allowed upon condition petitioners pay costs and attorneys' fees, and petitioners failed to meet the conditions imposed, the adjudication that respondents' motion for directed verdict should have been granted in the former proceeding is res judicata. *Lee v. King*, 640.

JURY

§ 1. Right to Trial by Jury

Special proceeding is remanded for trial where all parties requested a jury trial two years prior to the time the case was called and the requests were set out in the clerk's order transferring the case to the civil issue docket. *Shankle v. Shankle*, 692.

LABORERS' AND MATERIALMEN'S LIENS

§ 7. Sufficiency of Notice or Claim of Lien

Notice of claim of lien which referred to 4 December 1973 instead of 1972 as the time labor and materials were first furnished was fatally defective. *Canady v. Creech*, 673.

LANDLORD AND TENANT

§ 2. Form, Requisites and Validity of Leases

An agreement to execute a lease was not binding on defendant since the agreement failed to provide for the time and manner of payment of rent and the provisions in the lease submitted by plaintiff were different from those in the agreement. *Smith v. House of Kenton Corp.*, 439.

§ 8. Duty to Repair

The landlord is under a duty to exercise reasonable care in the actual repair of leased premises regardless of a covenant to repair. *Carson v. Cloninger*, 699.

LARCENY

§ 1. Elements of the Crime

Trial court's instructions on felonious intent were proper. *S. v. Wilson*, 341.

§ 6. Competency and Relevancy of Evidence

Currency seized from the trunk of defendant's automobile was properly admitted in a larceny case. *S. v. Brown*, 291.

LARCENY — Continued

§ 7. Sufficiency of Evidence

State's evidence that defendant drove a getaway car was sufficient for the jury in a prosecution for breaking and entering and larceny. *S. v. Thompson*, 339.

State's evidence in a felonious larceny case was sufficient to establish the value of wire allegedly stolen as exceeding \$200. *S. v. McCambridge*, 334.

Evidence was sufficient to be submitted to the jury in a prosecution for larceny of an automobile, *S. v. Wilson*, 341; of money, *S. v. Brown*, 291; of shotguns, *S. v. Pittman*, 371; of TV from apartment, *S. v. Person*, 327.

§ 8. Instructions

Instructions on value were proper in a prosecution for felonious larceny of copper wire. *S. v. McCambridge*, 334.

Trial court's definition of larceny without including the element "without the owner's consent" was proper. *S. v. Hickman*, 662.

LIMITATION OF ACTIONS

§ 18. Sufficiency of Evidence, Nonsuit and Directed Verdict

Plaintiff's claim to set aside a deed allegedly based on fraud was barred by the three-year statute of limitations. *Brown v. Vick*, 404.

MANDAMUS

§ 1. Nature and Grounds of the Writ

Remedy formerly provided by the writ of mandamus is still available through the equitable remedy of mandatory injunction. *Fleming v. Mann*, 418.

MASTER AND SERVANT

§ 11. Agreement Not to Engage in Like Employment After Termination of Employment

Provision of an insurance agency manager's agreement whereby the manager forfeits a monthly retirement allowance if he is licensed to sell or sells any kind of insurance in N. C. during the payment period set forth in the agreement is not against public policy and is valid. *Hudson v. Insurance Co.*, 501.

§ 59. Workmen's Compensation: Negligence or Wilful Act of Third Person

Although an assault may be an accident within the meaning of the Compensation Act, plaintiff's injury resulting from a shooting by a third person was not an accident arising out of his employment. *Williams v. Salem Yarns*, 346.

§ 72. Partial Disability

Question of permanent partial disability of defendant's foot was not before the Industrial Commission in a workman's compensation hearing. *Giles v. Tri-State Erectors*, 148.

MASTER AND SERVANT—Continued**§ 94. Findings and Award of Commission**

Industrial Commission's conclusion that plaintiff was entitled to additional compensation for temporary total disability was erroneous where the Commission failed to make any findings of fact regarding plaintiff's disability during the period in question. *Cape v. Forest Products Co.*, 645.

§ 77. Review of Award for Change of Condition

Evidence presented to the Industrial Commission and findings of the Commission lacked specificity necessary for the court to determine whether plaintiff's right to compensation was suspended by his refusal to undergo a diagnostic examination. *Cape v. Forest Products Co.*, 645.

MORTGAGES AND DEEDS OF TRUST**§ 24. Foreclosure by Action**

A special proceeding in the superior court is not the proper proceeding for foreclosure of a mortgage or deed of trust. *Shaw v. Wolf*, 73.

§ 36. Waiver of Right to Attack Foreclosure, and Estoppel

Failure of plaintiffs who executed a deed of trust to file an answer in a proceeding for the purpose of foreclosing the deed of trust did not estop plaintiffs from raising defenses against the foreclosure which they sought to enjoin. *Shaw v. Wolf*, 73.

MUNICIPAL CORPORATIONS**§ 30. Zoning Ordinance and Building Permits**

A municipal zoning ordinance which prohibited the operation of a building materials salvage yard within a defined area and allowed those engaged in such business in that area three years to remove their business was constitutional. *S. v. Joyner*, 27.

Developer of a lakeside campsite project made substantial expenditures in good faith prior to passage of a county zoning ordinance which would have prevented such project. *In re Campsites Unlimited*, 250.

Sale of land by reference to an unapproved plat did not render contract of sale void or voidable. *Financial Services v. Capitol Funds*, 377.

§ 43. Claims and Actions Against Municipality for Damage to Lands

Letter from plaintiff's attorney to the city manager did not comply with a city charter requirement that any claim against the city be presented to the city council prior to the commencement of a suit on the claim. *Redmond v. City of Asheville*, 739.

NARCOTICS**§ 1. Elements and Essentials of Statutory Offenses**

Statute under which defendant was charged with possession of marijuana with intent to distribute was constitutional. *S. v. Kaplan*, 410.

§ 2. Indictment

Bills of indictment charging defendant with felonious distribution of amphetamines were valid. *S. v. Splawn*, 14.

NARCOTICS — Continued

§ 3. Competency and Relevancy of Evidence

Trial court properly permitted an SBI chemist to testify that his analysis of tablets showed them to contain amphetamine and methamphetamine rather than permitting the chemist to testify only as to his opinion as to what the tablets contained. *S. v. Splawn*, 14.

Error in admission of SBI agent's testimony that contents of a package "appeared to be heroin" was harmless. *S. v. Ingram*, 186.

Officer properly testified that seized bags of marijuana are known as "ounce bags." *S. v. Zimmerman*, 396.

§ 4. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for the jury in a prosecution for felonious distribution of amphetamine tablets to SBI agents. *S. v. Splawn*, 14.

Trial court erred in failing to grant defendant's motion for nonsuit in a prosecution for possession of LSD. *S. v. Ledford*, 314.

Defendant was in constructive possession of marijuana found in a tent located in the woods behind his house. *S. v. Kaplan*, 410.

Evidence was sufficient for the jury on the issue of defendant's constructive possession of narcotics found under a mattress in a motel room; *S. v. Logan*, 461; of heroin found in a plastic bag in his garbage can under his carport. *S. v. Barfield*, 619.

§ 4.5. Instructions

Trial court properly instructed the jury that it could infer defendant knowingly possessed heroin if it found defendant was in control of the premises where the heroin was found. *S. v. Logan*, 461.

Trial court properly failed to instruct on simple possession in a prosecution for possession with intent to distribute. *S. v. Zimmerman*, 396.

§ 6. Forfeitures

In a proceeding for the remission of an automobile confiscated because of its use in transporting marijuana, evidence was sufficient to support the trial court's finding that petitioner knew his son had been operating the vehicle in question with marijuana in it. *S. v. Richardson*, 33.

NEGLIGENCE

§ 18. Contributory Negligence of Minors

Trial court properly charged the jury on the presumption that a child between the ages of seven and fourteen is incapable of contributory negligence. *Pope v. McLamb*, 666.

§ 57. Sufficiency of Evidence and Nonsuit in Actions by Invitees

Evidence was sufficient for the jury in an action to recover for personal injury received when the nozzle on the hose in a self-service car wash jumped out of the holder and struck plaintiff in the eye. *Spears v. Distributing Co.*, 445.

§ 58. Nonsuit for Contributory Negligence of Invitee

Plaintiff was not contributorily negligent as a matter of law when the nozzle on the hose in a self-service car wash jumped out of the holder and struck her in the eye. *Spears v. Distributing Co.*, 445.

NEGLIGENCE — Continued

§ 60. Duties and Liabilities to Trespassers

Defendant in a damages action could not rely on plaintiff's status as a trespasser in asserting that his standard of care was only that plaintiff not be wilfully or wantonly injured since defendant was a trespasser himself. *McLamb v. Jones*, 670.

PARENT AND CHILD

§ 1. The Relationship Generally

Definitions of custodian and person in loco parentis. *Shook v. Peavy*, 230.

§ 9. Prosecution for Nonsupport

Evidence was sufficient to be submitted to the jury in a prosecution for nonsupport of children. *S. v. Perry*, 190.

PARTITION

§ 8. Sale for Partition and Confirmation

Orders of an assistant clerk of superior court directing and confirming sale of land for partition are set aside where the record shows no evidence was presented and no findings were made to support a conclusion that an actual partition could not be made without injury to the parties. *Butler v. Weisler*, 233.

PHYSICIANS AND SURGEONS

§ 17. Departing from Approved Methods or Standard of Care

There was a genuine issue with respect to negligence of physician in failing properly to diagnose and treat the minor plaintiff for appendicitis. *Hall v. Funderburk*, 214.

§ 20. Causal Connection Between Malpractice and Injury

In a malpractice action, the burden was on defendant movant for summary judgment to establish absence of causal relation between negligent act and injury. *Hall v. Funderburk*, 214.

RECEIVERS

§ 9. Actions by Receiver

Trial court properly denied defendant's motion for summary judgment and erred in allowing plaintiff's motion for judgment on the pleadings in an action by the receivers for an insolvent corporation to recover the balance of construction loan funds held by defendant savings and loan association which the corporation allegedly assigned to defendant bank to secure payment of a loan. *Whitmire v. Savings & Loan Assoc.*, 39.

RECEIVING STOLEN GOODS

§ 5. Sufficiency of Evidence

Evidence was sufficient to be submitted to the jury in a prosecution for feloniously receiving stolen credit cards. *S. v. Arney*, 349.

REFORMATION OF INSTRUMENTS

§ 3. Parties

Plaintiffs were without standing to force an action to reform the deed from defendant developer to the Barfields' predecessors since there was no privity between plaintiffs, who were adjacent landowners to the Barfields, and any defendants. *Shipton v. Barfield*, 58.

REGISTERS OF DEEDS

It is not the function of the register of deeds to inquire into the substance or the legal efficacy of the documents presented to him for recording; if they are properly acknowledged and probated and if the appropriate fee is tendered, it is his duty promptly to record and index them. *Fleming v. Mann*, 418.

Letters addressed to plaintiff pertaining to a boundary dispute and an affidavit outlining the boundary dispute were properly recorded by the register of deeds. *Ibid.*

REGISTRATION

§ 1. Instruments Within Purview of Statutes

Letters addressed to plaintiff pertaining to a boundary dispute and an affidavit outlining the boundary dispute were properly recorded by the register of deeds. *Fleming v. Mann*, 418.

§ 3. Registration as Notice

An unauthorized recorded document simply gives no constructive notice of its contents. *Fleming v. Mann*, 418.

ROBBERY

§ 2. Indictment

Armed robbery of each of two people was a separate and distinct offense for which defendants could be prosecuted and punished. *S. v. Johnson*, 52.

"Same evidence" rule was not applicable in an armed robbery case where defendants had previously been tried and found guilty of robbing one victim and they were subsequently tried for robbery of a second victim. *Ibid.*

§ 3. Competency of Evidence

Evidence that defendant was in possession of a pistol a month before the robbery was properly admitted in an armed robbery case. *S. v. Grace*, 517.

§ 4. Sufficiency of Evidence and Nonsuit

There was sufficient evidence of felonious intent to support submission of offense of common law robbery of a highway patrolman where defendant fled with the patrolman's pistol and kept it for two days. *S. v. Gatewood*, 211.

State's evidence was sufficient for the jury in a prosecution for armed robbery of a Kwik-Pik store, *S. v. Reid*, 217; of a man, *S. v. Alderman*, 557; of a convenience store, *S. v. Ellerbe*, 708.

ROBBERY — Continued

Trial court in a prosecution for armed robbery of a police officer did not err in refusing defendant's motion for a directed verdict. *S. v. Jones*, 686.

§ 5. Submission of Lesser Degrees of Crime

Trial court in an armed robbery case did not err in failing to submit a lesser included offense. *S. v. Jones*, 686.

RULES OF CIVIL PROCEDURE**§ 12. Defenses and Objections**

Where the court found the name of one defendant was inadvertently omitted from a motion to dismiss, court had discretion to allow an oral motion that such defendant's name be included in the motion. *Fleming v. Mann*, 418.

§ 26. Depositions in a Pending Action

A deposition was properly admitted in evidence where the court found that the witness resided more than 75 miles from the place of trial and was ill and could not attend court. *Golding v. Taylor*, 171.

§ 41. Dismissal of Actions

By introducing evidence, respondents waived the right to have reviewed on appeal the question whether their motion for involuntary dismissal made at the close of petitioner's evidence was erroneously denied. *Redevelopment Comm. v. Unco., Inc.*, 574.

Where the Supreme Court ruled that respondents were entitled to a directed verdict unless superior court allowed a motion for voluntary dismissal without prejudice, such motion was allowed upon condition petitioners pay costs and attorney's fees, and petitioners failed to meet the conditions imposed, the adjudication that respondents' motion for directed verdict should have been granted in the former proceeding is *res judicata*. *Lee v. King*, 640.

§ 50. Motion for Directed Verdict and for Judgment N.O.V.

In passing upon a trial court's ruling denying a defendant's motion for a directed verdict, the appellate court must consider all of the evidence, including that which was incompetent. *Huff v. Thornton*, 388.

Trial court properly denied defendants' motion for directed verdict where defendants failed to state specific grounds therefor. *Hedden v. Hall*, 453.

Prior denial of a motion for directed verdict is not a bar to a motion for judgment n.o.v. *Hargett v. Air Service*, 636.

Motion for directed verdict must state the specific grounds therefor. *Cheek v. Lange*, 689.

Validity of trial court's denial of plaintiffs' motion for directed verdict is not presented for review since plaintiffs subsequently introduced evidence. *Ibid*.

§ 51. Instructions to Jury

Trial court's remarks with reference to plaintiff's evidence and counsel did not constitute an expression of opinion. *Hines v. Pierce*, 324.

RULES OF CIVIL PROCEDURE — Continued

§ 52. Findings by Court

Absent a request, the trial judge is not required to find the facts upon which he based his ruling denying defendant's motion to set aside the judgment. *Haiduven v. Cooper*, 67.

Trial court's finding that it was impossible to determine from the evidence presented the nature of the transactions between intestate and defendant was insufficient to satisfy the requirements of G.S. 1A-1, Rule 52(a) (1). *Finley v. Williams*, 272.

A judge who tries a case without a jury must find the facts specially and state separately his conclusions of law. *Davis v. Enterprises*, 581.

§ 56. Summary Judgment

In a malpractice action, the burden was on defendant movant for summary judgment to establish absence of causal relation between negligent act and injury. *Hall v. Funderburk*, 214.

§ 59. New Trial

Motion for a new trial under Rule 59 is addressed to the sound discretion of the trial judge. *In re Brown*, 109.

Trial court in a personal injury action did not abuse its discretion in granting a new trial based on inadequacy of damages. *Setzer v. Dunlap*, 362.

§ 60. Relief from Judgment or Order

In order to grant a motion under Rule 60(b) to relieve a party from a final judgment on the ground of mistake, inadvertence, surprise or excusable neglect, the court must find both that defendant's neglect was excusable and that he had a meritorious defense. *Haiduven v. Cooper*, 67.

Trial court properly denied motion under Rule 60 for relief from an order pertaining to custody of a dependent child. *In re Brown*, 109.

Court had no jurisdiction to rescind its judgment denying plaintiff's Rule 60 motion to set aside its dismissal of the action for lack of jurisdiction while an appeal from the judgment was pending. *Sink v. Easter*, 296.

Defendant's contention that the trial court's judgment was void because an amended complaint was not personally served upon her is without merit. *Homes, Inc. v. Harris*, 705.

Trial judge erred in striking out the judgment of dismissal entered against plaintiff by another superior court judge for failure of plaintiff to prosecute her action. *Campbell v. Trust Co.*, 631.

SALES

§ 22. Actions for Defective Materials

Summary judgment was properly entered for defendants in a subcontractor's fourth-party action against the manufacturer of roofing materials to recover damages resulting from the defective condition of a roof installed by plaintiff. *Furniture Corp. v. King-Hunter, Inc.*, 43.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Having observed vials of pills and capsules in plain view in defendant's vehicle, officers could reasonably conclude that the vehicle contained other contraband which justified a complete search of the vehicle. *S. v. Reid*, 194.

Officer who was lawfully in defendant's car properly searched the front seat without a warrant after having seen defendant conceal something in the seat. *S. v. Zimmerman*, 396.

Search warrant was not required for officers to search a tent located in the woods behind defendant's house. *S. v. Kaplan*, 410.

A paper bag and lottery tickets and money therein were properly seized from defendant's car without a warrant by an officer driving the car to the police station. *S. v. Dawson*, 712.

Where an officer discovered a pistol in defendant's glove compartment and arrested defendant for possession of a pistol in a vehicle without a permit, the subsequent search inside the vehicle was incident to defendant's arrest and was reasonable. *S. v. Byrd*, 718.

Where defendant could not produce a registration certificate when he was stopped by police in N. J., an examination of the glove compartment for evidence of registration was reasonable. *Ibid.*

§ 3. Requisites and Validity of Search Warrant

A warrant to search defendant, his apartment, and his vehicle was properly issued. *S. v. Best*, 507.

Affidavit for a search warrant based on information received from a confidential informant sufficiently informed the magistrate of circumstances from which the informant concluded that narcotics were in a certain motel room, and the information was sufficient for the magistrate to conclude the informant was credible and his information reliable. *S. v. Logan*, 461.

Search warrant for marijuana was valid. *S. v. Brissenden*, 730.

§ 4. Search Under the Warrant

Search of a vehicle parked on a service station lot pursuant to a warrant to search the service station and surrounding premises was proper. *S. v. Reid*, 194.

A search warrant specifically authorized a search of defendant's residence. *S. v. Best*, 507.

Where officers, on the basis of information received from a confidential informant, searched defendant for narcotics but found none, and officers received additional information from the informant that he had observed narcotics on defendant a short time before the search, a second search at the sheriff's department after the officers had obtained a search warrant did not violate defendant's constitutional rights. *S. v. Passarella*, 522.

When an officer may seize mere evidence. *S. v. Zimmerman*, 396.

Officers lawfully seized cigarette wrapping papers, a smoking pipe and a traffic citation while executing a warrant to search for marijuana. *Ibid.*

SEARCHES AND SEIZURES — Continued

Officers' entry into defendant's home was lawful where they knocked on defendant's door, announced their identity and heard no response from defendant. *S. v. Barfield*, 619.

Entry by officers in the execution of a search warrant was valid where an officer knocked on a door and was greeted by one defendant who was inside the premises. *S. v. Brissenden*, 730.

SPECIFIC PERFORMANCE

Evidence was sufficient to show that testator effectively substituted plaintiffs in place of their mother in a contract to devise property. *Rape v. Lyerly*, 241.

STATE

§ 4. Actions Against the State

By entering into a statutorily authorized contract of employment for a specific term of years, the State impliedly waived its immunity from suit for a breach thereof. *Smith v. State*, 423.

TAXATION

§ 25. Ad Valorem Taxes

Value for ad valorem taxation of goods in process of an electronic components manufacturer was not the scrap value, and goods were properly assessed at their book value. *In re Appeal of AMP, Inc.*, 562.

§ 29. Income Tax of Corporations

There was no continuity of business enterprise where a wholly owned subsidiary was merged into its parent corporation, and the surviving corporation was not entitled to carry forward and deduct from its income taxes a net economic loss incurred by the subsidiary the preceding year. *Mills, Inc. v. Coble*, 157.

§ 31. Sales and Use Taxes

Fabric taken from a furniture manufacturer's inventory for use in making swatch books is subject to the use tax. *In re Clayton-Marcus Co.*, 6.

§ 38. Remedies of Taxpayer Against Collection of Tax

The prima facie correctness of an assessment made by proper taxing authorities must be affirmatively overcome by the taxpayer. *In re Appeal of AMP, Inc.*, 562.

TORTS

§ 7. Release from Liability

Widow could not execute release from wrongful death claim which is binding on the deceased husband's estate prior to the time she was appointed personal representative of the estate. *Todd v. Adams*, 104.

TRESPASS

§ 6. Competency and Relevancy of Evidence of Civil Trespass

Trial court properly allowed evidence of the general reputation that land is owned by the person in possession where the possessor attempted to prove title by adverse possession. *Hedden v. Hall*, 453.

§ 8. Damages

Trial court's instructions on diminished value were proper in an action to recover damages for alleged trespass. *Hedden v. Hall*, 453.

TRESPASS TO TRY TITLE

§ 1. Nature and Essentials of Right of Action

When the trial court, before reviewing the report of the referee in a processioning proceeding, permitted defendant to amend his answer to deny plaintiff's title, the proceeding was converted into an action to try title, and the referee's report purporting to adjudge superior title in plaintiff could not be adopted by the trial court. *Reeves v. Musgrove*, 535.

§ 4. Sufficiency of Evidence and Nonsuit

Plaintiff failed to prove title by any approved method and failed to show that the area in dispute was embraced within the descriptions in her deeds. *Hines v. Pierce*, 324.

TRIAL

§ 10. Expression of Opinion on Evidence by Court

Trial court's remarks with reference to plaintiff's evidence and counsel did not constitute an expression of opinion. *Hines v. Pierce*, 324.

Trial court's colloquy with a witness strengthened the witness's testimony as to value and thereby amounted to an expression of opinion by the judge. *Power Co. v. Busick*, 276.

§ 11. Argument of Counsel

Defendant's introduction of an affidavit constituted putting on evidence which entitled plaintiff to the opening and closing arguments to the jury. *Golding v. Taylor*, 171.

§ 13. Allowing Jury to Visit Scene

Trial court properly denied motion for jury view of the condemned property. *Redevelopment Comm. v. Weatherman*, 136.

Trial court did not abuse its discretion in denying defendants' motion that the jury be permitted to view plaintiffs' residence. *Huff v. Thornton*, 388.

§ 16. Withdrawal of Evidence

Trial court properly denied plaintiff's motion for mistrial following the granting of plaintiff's motion to strike. *Clemons v. Lewis*, 488.

§ 33. Statement of Evidence and Application of Law Thereto in Instructions

Defendant was not prejudiced by the court's remark in its instructions that counsel had agreed that the court need not review portions of the evidence sufficient to apply the law thereto. *Golding v. Taylor*, 171.

TRIAL — Continued

§ 37. Instructions on Credibility of Witnesses

Trial court properly instructed the jury to scan testimony of interested witnesses with caution without further instructing the jury which witnesses were interested. *Redevelopment Comm. v. Weatherman*, 136.

§ 40. Form and Sufficiency of Issues

Defendant cannot complain of an issue which he agreed could be submitted to the jury. *Benson v. Insurance Co.*, 481.

§ 48. Power of Court to Set Aside Verdict

Trial court did not err in denial of defendant's motion to set aside the judgment. *Credit Corp. v. Pearson*, 227.

§ 57. Trial and Hearing by the Court

Rules of evidence are not strictly enforced in nonjury trials. *Oil Co. v. Horton*, 551.

TRUSTS

§ 13. Creation of Resulting Trusts

Where one person buys land under a parol agreement to do so and to hold it for another until he repays the purchase money, the purchaser becomes a trustee for the party for whom he purchased the land, and equity will enforce such an agreement. *Brown v. Vick*, 404.

§ 19. Sufficiency of Evidence and Nonsuit

Actions and conduct of the parties were inconsistent with the theory that defendant was holding land purchased at a foreclosure sale in trust for the benefit of plaintiffs. *Brown v. Vick*, 404.

UNIFORM COMMERCIAL CODE

§ 11. Construction, Definitions and Subject Matter

The sale of a laundry and dry cleaning business was governed by the Uniform Commercial Code. *Miller v. Belk*, 1.

Defendant was a merchant with respect to the sale of mobile homes. *Davis v. Enterprises*, 581.

§ 15. Warranties

Evidence that the engine of a car purchased by plaintiff caught fire after three hours of operation was insufficient to establish a claim for relief under implied warranty of merchantability or implied warranty of fitness. *Rose v. Motor Sales*, 494.

Sale of a mobile home carried with it an implied warranty that the mobile home was fit for the purpose for which such goods are ordinarily used. *Davis v. Enterprises*, 581.

§ 19. Inspection of Goods

Plaintiff was entitled to inspect goods after they were delivered and to reject them, and his full payment in cash at the time of purchase would not impair his right to inspect following delivery. *Davis v. Enterprises*, 581.

UNIFORM COMMERCIAL CODE — Continued**§ 20. Breach, Repudiation and Excuse**

Buyer could revoke his acceptance made with knowledge of a non-conformity if the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured, and the nonconformity substantially impaired the value of the goods. *Davis v. Enterprises*, 581.

§ 21. Buyer's Remedies

Buyer who revokes his acceptance is not required to elect between revocation of acceptance or recovery of damages for breach of implied warranty of fitness. *Davis v. Enterprises*, 581.

§ 22. Seller's Remedies

Where plaintiff seller failed to give defendant buyer notice of her intention to resell subsequent to defendant's breach of contract, plaintiff was entitled only to the difference between the market price at the time and place for tender and the unpaid contract price. *Miller v. Belk*, 1.

VENDOR AND PURCHASER**§ 1. Requisites and Validity of Contracts of Sale and Options**

Written option contained all essential terms of the agreement within the purview of the statute of frauds although it was silent as to terms of payment of the purchase price. *Kidd v. Early*, 129.

§ 2. Duration of Contract

Time was not of the essence in a contract to purchase real estate where the contract provided it was to be definitely closed within a period of 30 days. *Walker v. Weaver*, 654.

§ 3. Description and Amount of Land

Description of land in an option contract which refers to "200 acres more or less of the C. F. Early farm. To be determined by new survey furnished by sellers" is only latently ambiguous and can be aided by parol evidence. *Kidd v. Early*, 129.

Sale of land by reference to an unapproved plat did not render contract of sale void or voidable. *Financial Services v. Capitol Funds*, 377.

§ 8. Purchaser's Right to Return of Deposit

Plaintiffs were not entitled to recover \$500 paid on the purchase price of a house when they subsequently decided not to perform their contract. *Walker v. Weaver*, 654.

VENUE**§ 4. Actions Against State**

The State was not entitled to a change of venue as a matter of right from a county where the cause of action arose. *Smith v. State*, 423.

§ 5. Actions Involving Title to or Right to Possession of Property

An action for specific performance of a contract to sell plaintiff certain corporate stock was not removable as a matter of right to the county where the stock certificates were actually located. *Davis v. Smith*, 657.

Trial court in an action to terminate a lease erred in denying defendant's motion for a change of venue to the county where the property in question was located. *Sample v. Motor Co.*, 742.

WAIVER

§ 3. Pleadings, Proof and Determination

Petitioner in a condemnation proceeding did not waive the right to appeal taxing of costs of expert witnesses by payment of such fees into court. *Redevelopment Comm. v. Weatherman*, 136.

WATERS AND WATERCOURSES

§ 1. Surface Waters

Evidence was sufficient to support trial court's finding that defendant changed the natural drainage of land and that this change caused mud and silt to be washed by surface waters from the upper to the lower tracts. *Sutherland v. Hickory Nut Corp.*, 434.

WILLS

§ 2. Contract to Devise or Bequeath

A revoked will in which testator agreed to devise property to plaintiffs' mother was a sufficient memorandum of the agreement between testator and plaintiffs' mother to comply with the Statute of Frauds. *Rape v. Lysterly*, 241.

Evidence was sufficient to show that testator effectively substituted plaintiffs in place of their mother in a contract to devise property. *Ibid.*

§ 6. Codicil

Evidence was sufficient for submission to the jury of an issue as to whether a handwritten letter sent by testator to an attorney who had prepared his will was intended by testator to serve as a codicil to his will. *In re Will of Mucci*, 428.

§ 13. Nature of Caveat Proceeding

A caveat is an in rem proceeding with parties being limited to classes of persons specified by statute. *In re Ashley*, 176.

§ 16. Parties to Caveat Proceedings

The only persons with standing to caveat a will are persons entitled under such will or interested in the estate. *In re Ashley*, 176.

Caveators who were nieces, nephews, grandnieces and grandnephews of testatrix did not have a pecuniary interest in deceased's estate. *Ibid.*

§ 34. Life Estates and Remainders

Action for the establishment of plaintiffs' title to land devised by their grandfather is remanded for a hearing on the merits. *McRorie v. Query*, 601.

§ 73. Action to Construe Will

Trial court's dismissal of plaintiff's action to determine distribution of testator's estate on the ground that such adjudication during the life of the life tenant would be premature is reversed where the life tenant died pending the appeal from the dismissal. *Pritchett v. Thompson*, 728.

WITNESSES**§ 5. Evidence Competent for Corroboration**

Plaintiff's testimony as to statements he made to a loan officer concerning the price he had agreed to pay defendant for a house was competent to corroborate plaintiff's trial testimony. *Andrews v. Builders and Finance, Inc.*, 608.

§ 7. Direct Examination

Trial court properly permitted a doctor to testify from notes which did not refresh his recollection rather than requiring the notes to be placed in evidence. *Johnson v. Johnson*, 449.

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